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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 228

FLORA REALTY AND INVESTMENT COMPANY,
Appellant,

vs.

CITY OF LADUE

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI

STATEMENT AS TO JURISDICTION

VICTOR PACKMAN,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 228

FLORA REALTY AND INVESTMENT COMPANY, A CORPORATION,

Appellant,

vs.

CITY OF LADUE, A MUNICIPAL CORPORATION,

Appellee

JURISDICTIONAL STATEMENT IN SUPPORT OF PETITION FOR APPEAL BY FLORA REALTY AND INVESTMENT COMPANY TO THE UNITED STATES SUPREME COURT FROM A DECISION OF THE MISSOURI SUPREME COURT.

I

The Supreme Court of the United States has jurisdiction upon appeal to review the judgment of the Missouri Supreme Court in this case by virtue of Section 1257 (2) of Title 28, U. S. C. A.; 62 Stat. 929.

II

Petitioner filed a Bill in Equity in the Circuit Court of St. Louis County of the State of Missouri on the 24th day of

November 1948, for a judgment and decree that a portion of City Ordinance #282 (Zoning Ordinance) of the City of Ladue (herewith attached as Exhibit A) was void and unconstitutional insofar as it prevented the use of Petitioner's 104 acres of undeveloped land for residential purposes in tracts of less than three acres per family, or for institutional use.

III

A judgment was rendered by the trial Court in favor of the City of Ladue and on appeal taken from said judgment to the Supreme Court of the State of Missouri (cause #42103), it was affirmed on the 11th day of February, 1952. (Flora Realty and Investment Company vs. City of Ladue, 246 S. W. (2nd) 771). Your Petitioner in due time applied for a rehearing which was denied on the 10th day of March, 1952, when said judgment and decision became final.

IV

In the above action there was drawn in question the validity of a Statute of the State of Missouri (said City Ordinance of the City of Ladue) on the ground of its being repugnant to the Fourteenth Amendment to the Constitution of the United States, in that it deprived Petitioner of property without due process of law and denied it equal protection of law. (City Ordinances have been construed to be embraced within the meaning of the phrase "statute of a state", as used in Section 1257 (2) of Title 28, U. S. C. A.; 62 Stat. 929. See *Jamison* v. *Texas,* 318 U. S. 413, 414; 87 L. Ed. 869, 871.)

V

The Federal questions were raised in the Bill in Equity filed before the Circuit Court of the City of St. Louis by Petitioner (Tr. 5 to 11) and preserved in the Motion for New

Trial (Tr. 26) and were urged before the Supreme Court of Missouri under Points I, II and III on pages 20 to 25 of Petitioner's Brief before said Court en banc (herewith attached as Exhibit B), and on pages 6, 7, 8 and 9 of Motion for Rehearing (herewith attached as Exhibit C).

VI

The questions involved in this Appeal are substantial as appears from the Assignment of Errors. This Appeal raises the question of whether a city can arbitrarily restrict the use of land admirably suited for residential purposes, to tracts of not less than 130,580 square feet (3 acres) per family, and whether it can prevent the use of land suited for humanitarian institutions (homes for the aged, orphanages, hospitals, etc.) schools and churches in order to preserve and expand an exclusive estate district.

VII

The Supreme Court of Missouri in its Opinion affirmed the judgment of the trial Court, dismissing the Bill in Equity and it held that the restrictions of the Ordinance on the use of Petitioner's property for residential purposes in tracts of not less than three acres per family was a valid exercise of the police power of the municipality and not unreasonable; also that the restrictions therein on the use of Petitioner's property for institutional purposes was not unreasonable because not absolute in other Districts, and it cited Section 8 of the Ordinance, permitting use exceptions under certain circumstances, but it stated it could not rule on the validity of said Section because the issue was hypothetical as the pleadings and evidence did not show Petitioner had applied for or been denied a permit thereunder (for an institutional use exception) or that a specific insti-

tutional use was contemplated by Petitioner (See pages 14 and 15 of the Opinion herewith appended as Exhibit D).

VIII

A Petition for Appeal to the United States Supreme Court in due form was presented to the Supreme Court of Missouri on June 4, 1952 but no action has been taken thereon and none is anticipated prior to the expiration of 90 days from March 10, 1952. This Petition is being presented at this time to protect the rights of Proposed Appellant under Sec. 1257 (2) Title 28, U. S. C. A. (See *Matton Steamboat Co. Inc.*, v. *Murphy*, 319 U. S. 412, 63 S. Ct. 1126, 87 L. Ed. 1483.)

VICTOR PACKMAN,
Attorney for Flora Realty and
Investment Company, and
Proposed Appellant.

Dated: June 6th, 1952.

5

EXHIBIT "A"

"A"

Zoning Ordinance

No. 282

CITY OF LADUE,
ST. LOUIS COUNTY,
MISSOURI

EXHIBIT "V"

BILL No. 282
ZONING ORDINANCE
No. 282
CITY OF LADUE, MISSOURI

AN ORDINANCE to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards and other open spaces, the density of population, the location, erection, construction, reconstruction, alteration and use of buildings, structures and land for industry, trade, residence or other purposes; all for the purpose of promoting the health, safety, morals or general welfare of the City of Ladue, and for said purposes to divide the City of Ladue into districts; to provide for change of the regulations, restrictions and boundaries of such districts; to provide for a Board of Adjustment; to provide for enforcement, to prescribe penalties for violation of the provisions thereof; to repeal the City of Ladue's zoning ordinance and amendments thereto, being Zoning Ordinance No. 96 and amendatory Ordinances No. 122, No. 157, No. 197, No. 213, No. 215, No. 217, No. 229, No. 235, No. 243, No. 263, No. 271 and No. 278.

WHEREAS, on the 21st day of November, 1938, the Council of the City of Ladue passed and adopted a zoning ordinance being Ordinance No. 96 of said City in order to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards and other open spaces, the density of population, the location, erection, construction, reconstruction, alteration and use of buildings, structures and land for industry, trade, residence or other purposes; all for the purpose of promoting the health, safety, morals or general welfare of the City of Ladue, and for said purposes to divide the City of Ladue into districts; to provide for change of the regulations, restrictions and boundaries of such districts; to provide for a Board of Adjustment; to provide for enforcement and to prescribe penalties for violation of the provisions thereof; and

WHEREAS, said Zoning Ordinance No. 96 has subsequent to November 21, 1938, been amended by Ordinance No. 122, No. 157, No. 197, No. 213, No. 215, No. 217, No. 229, No. 235, No. 243, No. 263, No. 271 and No. 278; and

WHEREAS, it is deemed desirable that the provisions of said Zoning Ordinance No. 96 and the provisions of the amendments heretofore made be contained in a single Zoning Ordinance; and

WHEREAS, to accomplish said purpose of reenacting all the zoning provisions in a single ordinance the City Council submitted the form of this Ordinance No. 282 to the City Zoning and Planning Commission for its recommendations and report; and

WHEREAS, said City Zoning and Planning Commission filed its written report with the Clerk of the City on June 9, 1948; and

WHEREAS, the public hearing was held by the Council or Board of Aldermen of the City of Ladue on the 19th day of

July, 1948, the hour of 8 P. M. in the City Hall, Fifteen (15) days notice of the time and place for said hearing having been published in the Watchman Advocate, a paper of general circulation in the City of Ladue, at which hearing all persons who presented themselves and desired to be heard in connection therewith were heard.

NOW, THEREFORE,

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF LADUE, ST. LOUIS COUNTY, MISSOURI, AS FOLLOWS:

SECTION 1.

Definitions.

For the purpose of this Ordinance, certain terms and words are herewith defined as follows:

Words used in the present tense include the future; words in the singular number include the plural; and words in the plural include the singular; the word "building" includes the word "structure," the word "shall" is mandatory and not directory.

Accessory Building: A subordinate building or portion of main building, the use of which is incidental to that of the main building.

Basement: A story partly underground and having at least one-half of its height above the average level of the adjoining ground. A basement shall be counted as a story for the purpose of height measurement if subdivided and used for dwelling or business purposes.

Building: A structure as herein defined, not including boundary line fences not over three (3) feet high.

Building, Height of: The vertical distance measured from the average elevation of the finished grade along the front of the building to the highest point of the roof surface, if a flat roof; to the deck line of mansard roofs; and to the mean height level between eaves and ridge for gable, hip and gambrel roofs.

Business: Includes the Commercial and Industrial uses and districts as herein defined.

Cellar: A story having more than one-half of its height below the average level of the adjoining ground. A cellar shall not be counted as a story for purposes of height measurements.

District: One or more sections of the City of Ladue for which the regulations governing the height, area, and use of buildings and premises are the same.

Dwelling, One-Family: A detached building designed for or occupied exclusively by one family.

Family: One or more persons related by blood or marriage occupying a premises and living as a single housekeeping unit.

Frontage: All the property abutting on one side of a street or place between two intersecting streets or places (crossing or terminating) measured along the line of the street or place, or, if the street or place be dead-end street, then all the property abutting on one side between an intersecting street or place and the dead-end of the street or place.

Garage, Private: A garage with capacity for not more than three (3) self-propelled vehicles for storage only. Provided, however, a private garage may exceed a capacity of three (3) vehicles if located upon a lot containing an area of more than one (1) acre and there is an average of one-half (½) acre of

lot area for each additional vehicle over and above the three (3) vehicles and the one (1) acre area.

Garage, Public: Any premises, except those described as a private garage, used for the storage or care of self-propelled vehicles.

Home Occupation: Any occupation in connection with which there is used no sign or display that will indicate from the exterior that the building is being utilized in whole or in part for any purpose other than that of a dwelling; in connection with which there is kept no stock in trade nor commodity sold upon the premises, no persons employed other than a member of the immediate family residing in the premises, and no mechanical equipment installed or used except such as is normally used for purely domestic or household purposes; and provided that not over twenty-five percent (25%) of the total actual floor area of any story is used for any professional purposes.

Lot of Record: A lot which is a part of a subdivision, the map of which has been recorded in the office of the County Recorder of St. Louis County, or a lot described by metes and bounds, the description of which has been recorded in the office of the County Recorder of St. Louis County.

Lot: Land occupied or to be occupied by a building and its accessory buildings, together with such open spaces as are required under this Ordinance, but not including any land described in or included in an easement for a street.

Corner Lot: A lot situated at the junction of two or more streets or places.

Interior Lot: A lot other than a corner lot.

Through Lot: An interior lot having frontage on two parallel or approximately parallel streets or places.

Non-Conforming Use: A building or land occupied by a use that does not conform to the regulation of the use district in which it is situated.

Place: An open unoccupied space other than a street or alley permanently reserved as the principal means of access to abutting property.

Private Club: A building and area used for social purposes only, including the serving of food and refreshments, whose normal use is limited to members of the club and their guests, and which club does not provide a service customarily carried on as a business.

Stable, Private: A stable with capacity for not more than two horses, provided, however, that the capacity of a private stable may be increased if the premises whereon such stable is located contains an area of not less than one (1) acre for each horse accommodated.

Story: That portion of a building included between the surface of any floor and the surface of the floor next above it, or if there be no floor above it, then the space between such floor and the ceiling next above it.

Story, Half: A story under a gable, hip, or gambrel roof, the wall plates of which on at least two (2) opposite exterior walls are not more than two (2) feet above the floor of such story.

Street: A thoroughfare which affords the principal means of access to abutting property.

Structure: Anything constructed, erected or located thereon the use of which requires permanent location on the ground or which, though movable, is used for a purpose which usually and customarily involves permanent location on the ground (including, but without limiting the generality of the fore-

going, advertising signs, bill boards, poster panels, back stops for tennis courts, pergolas and structures for the housing of animals or fowls).

Structural Alterations: Any change in the supporting members of a building, such as bearing walls, columns, beams or girders, or any substantial change in the roof and exterior walls.

Yard: An open space on the same lot with a building unoccupied and unobstructed from the ground upward except as otherwise provided herein.

Front Yard: A yard extending across the front of the lot between the inner side yard lines and measured between:

(A) the front line of the lot and front lines of the building, and

(B) the front line of the lot and the nearest line of any porch or paved terrace.

Rear Yard: A yard extending across the full width of the lot and measured between the rear line of the lot and the rear of the building.

Side Yard: A yard between the buildings and the side line of the lot and extending from the street line to the rear yard.

SECTION 2.

Districts.

In order to regulate and restrict the location of trades and residences and the location of buildings erected or altered for specific uses, and to regulate and limit the height of buildings hereafter erected or altered, to regulate and determine the area of yards and other open spaces, and to regulate

and limit the density of population, the City of Ladue is hereby divided into districts, of which there shall be seven (7), as follows:

"A" Three Acre Residence District

"B" Residence District

"C" Residence District

"D" Residence District

"E" Residence District

"F" Commercial District

"G" Industrial District

The City of Ladue is hereby divided into seven (7) districts aforesaid and the boundaries of said districts are shown upon the official, consolidated map attached to this Ordinance covering all the territory now located in the City of Ladue, said map being made a part of this Ordinance and designated as the "District Map," dated the 17th day of May, 1948, and said map and all the notations, references, and other information shown thereon shall be as much a part of this Ordinance as if the matters and information set forth by said map were all fully described therein.

All territory hereafter annexed to the City of Ladue shall be in the "A" three-acre Residence District until changed by ordinance.

Whenever any street, alley or other public or private way is vacated by the City Council, or by adjoining property owners, the zoning districts adjoining each side of such street, alley or public way shall be automatically extended to the center of such vacation and all area included in the vacation shall then and henceforth be subject to all appropriate regulations of the extended districts.

Except as hereinafter provided:

(1) No building shall be erected, converted, reconstructed or structurally altered nor shall any building or land be used for any purpose other than is permitted in the district in which such building or land is located.

(2) No building shall be erected, reconstructed or structurally altered to exceed the height limit herein established for the district in which such building is located.

(3) No building shall be erected, reconstructed or structurally altered so as to intrude upon the area required for the front, side and rear yards as herein established.

(4) No lot area shall be so reduced or diminished that the yards or other open spaces shall be smaller than prescribed by this Ordinance, nor shall the density of population be increased in any manner except in conformity with the area regulations herein established.

(5) No building shall hereafter be erected or structurally altered unless located on a lot as herein defined, and in no case shall there be more than one building on one lot except as hereinafter provided.

SECTION 3.

Use Regulations.

"A," "B" and "C" Residence Districts

In the "A," "B" and "C" Residence Districts no building or land shall be used and no building shall be hereafter erected, converted or structurally altered unless otherwise provided in this ordinance, except for one or more of the following uses:

1. One-family dwellings.

2. Public parks.

3. Golf course, except miniature courses operated for commercial purposes.

4. Truck gardening.

5. Accessory buildings and uses customarily incident to the above uses, not involving the conduct of a business, including servant quarters and one private garage and one private stable.

6. Bulletin boards and signs not exceeding six (6) square feet in area, appertaining to the lease, hire or sale of a building or premises, provided, however, that no advertising sign of any other character shall be permitted in any "A," "B" or "C" Residence District.

SECTION 4.

Use Regulations.

"D" and "E" Residence Districts

In the "D" and "E" Residence Districts no building or land shall be used and no building shall be hereafter erected, converted or structually altered unless otherwise provided in this ordinance, except for one or more of the following uses:

1. Any use permitted in the "A," "B" or "C" Residence Districts.

2. Public schools, elementary or high, or private schools having a curriculum similar to a public elementary or high school; provided, however, that this shall not include any private nursery, kindergarten, or play schools.

3. Institutions of an educational or religious nature, but not including any penal or correctional institution nor commercial institution operated for profit.

4. Accessory buildings and uses customarily incident to any of the above uses, not involving the conduct of a business, including servant quarters and one private garage or private stable.

SECTION 5.

Use Regulations.

"F" Commercial District

In the "F" Commercial District no building or land shall be used and no building shall be hereafter erected, converted, or structurally altered, unless otherwise provided in this ordinance except for one or more of the following uses:

1. Any use permitted in the "D" and "E" District.

2. Bakery whose products are sold only at retail and only on the premises.

3. Barber shop or beauty parlor.

4. Dyeing and cleaning works employing not more than five (5) persons.

5. Gasoline or oil filling stations.

6. Offices.

7. Public garage, provided, however, that any portion of the garage which is used for storage or repair purposes shall not be nearer than twenty (20) feet to the front line of the building.

8. Restaurants.

9. Sales or show room.

10. Store or shop for the conduct of a retail business.

11. Studio.

12. Accessory buildings and uses customarily incident to the above uses including signs and bulletin boards not exceeding twelve (12) square feet in area pertaining to the lease, hire or sale of a building or premises, or to the advertisement of the business or any product sold on the premises; provided, however, that no billboard or sign of a larger size or of any other character shall be permitted in the "F" District.

Any building used primarily for any of the above enumerated purposes may have not more than forty per cent (40%) of the floor area devoted to storage purposes incidental to such primary use. The second floor of any commercial building may be occupied by not more than one family and no structure accommodating more than one family shall be erected or used in any commercial district.

SECTION 6.

Use Regulations.

"G" Industrial District

In the "G" Industrial District no building or premises shall be used and no building shall hereafter be erected, converted, or structurally altered except for one or more of the following uses and provided, further, that no residential unit shall hereafter be erected in any "G" Industrial District:

1. Any use permitted in the "F" Commercial District.

2. Lumber and building material yards.

3. Quarries.

4. Storage yards and warehouses, but not including junk yards.

5. Wholesale houses.

6. Any manufacturing plant or establishment which does not emit smoke, odor, noise, dust or gas to an extent that would be obnoxious or offensive: PROVIDED, however, that no plant concerned with the wholesale storage, or with the treatment or processing of petroleum or any of its derivatives shall be permitted in the "G" Industrial District until its location has been approved by the Building Commissioner and by the Chief of the Ladue Fire Department with reference to the safety and non-hazardous location and condition thereof.

SECTION 7.

Parking Regulations.

Whenever a structure is erected, converted, enlarged or structurally altered for any commercial or industrial use permitted in the "F" Commercial and the "G" Industrial District, off-street parking space for motor vehicles, improved with a durable surface, shall be provided either on the lot or within three hundred (300) feet thereof, in the following manner:

(a) For each commercial structure the area of the off-street parking space shall be adequate to accommodate one motor vehicle together with the necessary means of ingress and egress for each two hundred (200) square feet of floor space in the building; provided, however, that restaurants or establishments whose primary purpose is to serve meals or

drinks shall provide an area of off-street parking space adequate to accommodate one (1) car for each one hundred (100) square feet of floor space. Two (2) or more establishments may join together in providing the necessary parking space.

(b) For industrial buildings an off-street parking space shall be provided which is adequate to accommodate the vehicles of any employees on the premises and of any trucks or commercial vehicles used by the industry.

(c) Notwithstanding other regulations of this Ordinance the front, side and rear yards required around commercial and industrial buildings may be used for off-street parking.

(d) The City Council shall have the authority to permit the establishment of off-street parking space within residential districts not more than three hundred (300) feet from any commercial or industrial district, by special permit, but only when such requirements and standards of improving and operation of the parking space are imposed as will protect the character of the surrounding development. No such special permit shall be granted until after a public hearing and after a report has been submitted by the City Plan Commission in accordance with the requirements for other special permits as provided in Section 9 of this Ordinance.

(e) The Board of Adjustment is hereby authorized to vary or modify the parking regulations whenever conclusive evidence is submitted that the character of the commercial use is such that it does not require off-street parking facilities as required in this Section. The Board of Adjustment is also authorized to determine the off-street parking requirements for industrial establishments, and the decision of the Board of Adjustment shall be binding upon the Building Commissioner in the issuance of permits for such new construction and for parking lot requirements.

SECTION 8.

Non-Conforming Uses.

The lawful use of land existing at the time of the passage of this Ordinance No. 282, although such use does not conform to the provisions hereof, may be continued, but if such non-conforming use is discontinued, any future use of said premises shall be in conformity with the provisions of this Ordinance.

The lawful use of the building existing at the time of the passage of this Ordinance may be continued, although such use does not conform to the provisions hereof, and such use may be extended throughout the building provided no structural alterations, except those required by law or ordinance, are made therein. If no structural alterations are made, a non-conforming use of a building may be changed to another non-conforming use of the same or more restricted classification.

The foregoing provisions shall also apply to non-conforming uses in districts hereafter changed.

Nothing in this ordinance shall be taken to prevent the restoration of a building destroyed to the extent of not more than seventy-five per cent (75%) of its reasonable value, by fire, explosion or other casualty or act of God or the public enemy, nor the continued occupancy or use of such building or part thereof which existed at the time of such partial destruction.

Written application for the following uses may be filed with the City Clerk, together with the written evidence satisfactory to the Council that seventy-five per cent (75%) or more of the owners of the property located within one thousand (1,000) feet of the premises whereon such use is to be made, have been duly notified in writing of the filing of said application and the proposed use covered thereby;

and by such permit after public hearing (to be held not sooner than thirty [30] days after the date of filing such application and after due publication of notice thereof) after report by the City Planning Commission, the City Council, subject to such protective restrictions that it deems necessary to protect the character of the surrounding property and the public health, authorize the location, erection, reconstruction or structural alteration of any of the following land uses or structures in any district from which they are prohibited by this Ordinance; provided, however, in case the report of the City Planning Commission recommends the denial of said application, or in case of a protest against the granting of said application duly signed and acknowledged by the owners of ten per cent (10%) or more of the area of the property located within one thousand (1,000) feet of said premises, such authorization shall not be granted except by the favorable vote of three-fourths of all the members of the City Council.

1. Churches, and institutions of an educational, religious or philanthropic nature.

2. Public schools, elementary and high; private schools having a similar curriculum; and kindergarten, pre-kindergarten and nursery schools.

3. Riding academy or stables either in connection with private clubs or otherwise, where horses are cared for or rented for remuneration.

4. Libraries.

5. Airports.

6. Privately owned parks and similar recreational developments, but only in the "E" Residence District.

7. Any building or land owned and operated by any department of the City, County, State or Federal Government.

8. Private clubs.

SECTION 9.

Height and Area Regulations.

"A" and "B" Residence Districts.

In the "A" and "B" Residence Districts the height of buildings, the minimum dimension of yards and the minimum lot area per family shall be as follows:

Height: No building hereafter erected or structurally altered shall exceed two and one-half (2½) stories, or forty (40) feet. (See Section 14.)

Side and Rear Yards: No building and/or accessory building hereafter erected or structurally altered shall be located within fifty feet of any side or rear lot line. (See Sections 14 and 15.)

Front Yard: In the "A" Residence District there shall be a front yard not less than seventy-five (75) feet to the front line of the building and in the "B" Residence District there shall be a front yard of not less than fifty (50) feet to the front line of the building, provided, however, that:

The front building line in both the "A" and "B" Residence Districts shall conform with the average set back of front building line that has been established by existing developments; provided, further, that the provisions hereof shall be subject to the provisions of Sections 14 and 15 of this Ordinance.

Lot Area Per Family: In the "A" Three-Acre Residence District every single family dwelling hereafter erected or structurally altered shall provide a lot area of not less than three (3) acres per family.

In the "B" Residence District every single family dwelling hereafter erected or structurally altered shall provide a lot area of not less than one and eight-tenths (1-8/10) acres per family.

Provided, however, that these provisions shall not be so interpreted as to preclude the accommodations for domestic servants employed and living on the premises.

Provided, further, that where a lot has less area than herein required and was of record on December 2, 1936, or was of record when the area was subsequently annexed to the City of Ladue, said lot may be occupied by a single family dwelling and the usual accessory buildings, and any single-family dwelling existing upon said lot may be structurally altered.

SECTION 10.

Height and Area Regulations.

"C" Residence District

In the "C" Residence District the height of buildings, the minimum dimensions of yards, and the minimum lot area per family shall be as follows:

Height: No building hereafter erected or structurally altered shall exceed two and one-half (2½) stories or forty (40) feet. (See Section 14.)

Rear Yard: Every building, other than accessory buildings, that is hereafter erected or structurally altered, shall provide

a rear yard of not less than thirty (30) feet. Accessory buildings hereafter erected or structurally altered may occupy not more than twenty per cent (20%) of the required rear yard, but shall not be located within ten (10) feet of the rear line of the lot, nor within five (5) feet of any side line of the lot. (See Sections 14 and 15.)

Side Yard: There shall be a side yard on each side of a building having a width of not less than ten per cent (10%) of the average width of the lot, provided such side yard shall not be less than ten (10) feet, but need not exceed twenty (20) feet. (See Sections 14 and 15.)

The above regulation shall apply to all lots, including corner lots, and in the case of reversed corner lots which face an intersecting street, the side yard of the street or place side of such corner lot shall be increased from ten per cent (10%) of the width of the lot to fifty per cent (50%) of the front yard required on the lots in the rear of such corner lot; provided, however, that this additional width of the side yard on the street side of the reversed corner lot shall not reduce the buildable width of such lot, if of record at the time of the passage of this ordinance, to less than thirty-five (35) feet. Provided, however, that no accessory building on said reversed corner lot shall project beyond the front yard line of the lots in the rear, but this regulation shall not prohibit the erection of an accessory building whenever it cannot be reasonably complied with.

Front Yard: There shall be a front yard of not less than fifty (50) feet to the front line of the building and not less than forty (40) feet to the front line of an open porch or paved terrace, provided, however, that:

The front yard building line in the "C" Residence District shall conform with the average set back or front building line that has been established by existing developments; provided, further, that the provisions hereof shall be subject to the provisions of Sections 14 and 15 of this said Ordinance.

Lot Area Per Family: Every single family dwelling hereafter erected or structurally altered shall provide a lot area of not less than thirty thousand (30,000) square feet per family, provided, however, that this provision shall not be so interpreted as to preclude the provision for domestic servants employed and living on the premises.

Provided, further, that where a lot has less area than herein required and was of record on December 2, 1936, or was of record when the area was subsequently annexed to the City of Ladue, said lot may be occupied by a single-family dwelling and the usual accessory buildings, and any single-family dwelling existing upon said lot may be structurally altered.

SECTION 11.

Height and Area Regulations.

"D" and "E" Residence Districts

In the "D" and "E" Residence Districts the height of buildings, the minimum dimensions of yards and the minimum lot area per family shall be as follows:

Height: No building hereafter erected or structurally altered shall exceed two and one-half (2½) stories, or thirty-five (35) feet. (See Section 14.)

Rear Yard: There shall be a rear yard having a depth of not less than thirty (30) feet. Accessory buildings hereafter erected or structurally altered may occupy not more than thirty per cent (30%) of the required rear yard, provided, however, that no accessory building shall be located within five (5) feet of any lot line. (See Sections 14 and 15.)

Side Yard: On interior lots there shall be a side yard on each side of a building having a width of not less than ten per cent (10%) of the width of the lot, provided such side

yards shall not be less than six (6) nor need not exceed twelve (12) feet in width. (See Sections 14 and 15.)

In the case of a reversed corner lot the side yard on the street or place side of the reversed corner lot shall be the same as required for reversed corner lots in the "C" Residence District, except that the buildable width of such lots shall not be reduced to less than thirty (30) feet.

Front Yard: There shall be a front yard of not less than forty (40) feet to the front line of the building and not less than thirty (30) feet to the front line of an open porch or paved terrace, provided, however, that:

The front yard building line in the "D" and "E" Residence Districts shall conform with the average set back or front building line that has been established by existing developments; provided, further, that the provisions hereof shall be subject to the provisions of Sections 14 and 15 of this said Ordinance.

Lot Area Per Family: In the "D" Residence District every single-family dwelling hereafter erected or structurally altered shall provide a lot area of not less than fifteen thousand (15,000) square feet per family. In the "E" Residence District every single-family dwelling hereafter erected or structurally altered shall provide a lot area of not less than ten thousand (10,000) square feet per family.

Provided, however, that this provision shall not be so interpreted as to preclude the provisions for domestic servants employed and living in the household.

Provided, further, that where a lot has less area than herein required and was of record on December 2, 1936, or was of record when the area was subsequently annexed to the City of Ladue, said lot may be occupied by a single-family dwelling and the usual accessory buildings, and any single-family dwelling existing upon said lot may be structurally altered.

SECTION 12.

Height and Area Regulations.

"F" Commercial District

In the "F" Commercial District the height of buildings, the minimum dimensions of yards, and the minimum lot area per family shall be as follows: Provided, however, that buildings erected for single-family dwelling purposes shall comply with the rear and side yard regulations of the "E" Residence District.

Height: No building hereafter erected or structurally altered shall exceed two and one-half (2½) stories, or thirty-five (35) feet. (See Section 14.)

Rear Yard: There shall be a rear yard having a depth of not less than thirty (30) feet. Accessory buildings hereafter erected or structurally altered may occupy not more than thirty per cent (30%) of the required yard, provided, however, that no accessory building shall be located within five (5) feet of any lot line. (See Sections 14 and 15.)

Side Yard: Where a lot abuts upon the side of a lot zoned for dwelling purposes, there shall be a side yard of not less than seven (7) feet. Where a reversed corner lot rears upon a lot zoned for dwelling purposes, the side yard on the street or place side of the reversed corner lot shall be the same as required in the "D" and "E" Residence Districts. In all other cases, a side yard for a business building shall not be required, but if provided, it shall not be less than five (5) feet. (See Sections 14 and 15.)

Front Yard: There shall be a front yard of not less than forty (40) feet to the front line of the building and not less than thirty (30) feet to the front line of an open porch or paved terrace, provided, however, that:

Where lots comprising forty (40) per cent or more of the frontage are developed with buildings having an average front yard with a variation of not more than six (6) feet, no building hereafter erected or structurally altered shall project beyond the average front yard line so established; provided, further, that this regulation shall not be so interpreted as to require a front yard of more than sixty (60) feet. (See Sections 14 and 15.)

Lot Area Per Family: In the "F" Commercial District every single-family dwelling hereafter erected or structurally altered shall provide a lot area of not less than ten thousand (10,000) square feet per family, provided, however, that one residence unit may be provided above each store having a frontage of not less than twenty-five (25) feet, even though the lot accommodating such store contains less than ten thousand (10,000) square feet.

SECTION 13.

Height and Area Regulations.

"G" Industrial District

In the "G" Industrial District the height of buildings and the minimum dimension of yards shall be as follows:

Height: No building hereafter erected or structurally altered shall exceed three (3) stories, or forty-five (45) feet. (See Section 14.)

Rear Yard: There shall be a rear yard having a depth of not less than thirty (30) feet except where the "G" Industrial District abuts on a dwelling district, in which case there shall be a rear yard having a depth of not less than fifty (50) feet.

Side Yard: There shall be a side yard on each side of a lot having width of not less than twenty (20) feet, except that

where the lot or tract has a width of less than one hundred and fifty (150) feet the width of each side yard may be reduced to ten per cent (10%) of the total width of the lot, but in no instance shall it be less than twelve (12) feet.

Front Yard: Where all the frontage on one side of the street or place between two intersecting streets or places is located in the "G" Industrial District, a front yard of not less than thirty-five (35) feet shall be provided. Where the frontage on one side of the street between two intersecting streets or places is located in the "G" Industrial District and in a dwelling district, the front yard requirements of the dwelling district shall apply to the Industrial District.

SECTION 14.

Height and Area Regulations and Exceptions.

The foregoing requirements in the height and area districts shall be subject to the following regulations and exceptions:

Height: (a) Chimneys, towers, monuments, cupolas, domes, spires, false mansards, parapet walls, and similar structures and necessary mechanical appurtenances may be erected as to their height in accordance with existing or hereafter adopted ordinances of the City of Ladue.

(b) Public and semi-public buildings, schools, institutions and private clubs may be erected to a height not exceeding three (3) stories or fifty (50) feet, provided that the front, side and rear yards are increased an additional two (2) feet for each foot such buildings exceed the height limitation of the district in which they are located.

Area: (a) On through lots exceeding two hundred (200) feet in depth the front yard regulations along each street shall be observed.

(b) The side yard requirements for dwellings shall be waived where dwellings are erected above stores.

(c) Every part of a required yard shall be open from its lowest point to the sky unobstructed, except for the ordinary projection of sills, belt course, cornices, buttresses, ornamental features, and eaves; provided, however, that none of the above projections shall extend into a minimum side yard more than twenty-four (24) inches.

(d) Open or enclosed fire-proof outside stairways and balconies projecting into a yard not more than three and one-half (3½) feet, and the ordinary projections of chimneys and flues may be permitted by the Building Commissioner where same are so placed as not to obstruct the light and ventilation.

(e) In computing the depth of a rear yard, for any building where such rear yard opens into an alley, one-half of such alley may be assumed to be a portion of the rear yard.

(f) More than one (1) industrial, commercial or institutional building may be erected upon a single lot or tract, but the yards and open spaces required around the boundaries of the lot or tract shall not be encroached upon by any such buildings, nor shall there be any change in the lot area per family requirements, and each building shall be separated from each other building on the lot by twenty-four (24) feet or more; provided, however, that in cases of hardship, as defined in the Zoning Ordinances of the City of Ladue, the Zoning Board of Adjustment shall have authority to grant relief.

(g) Fences not exceeding six feet in height may be erected on a lot or the boundaries thereof, but no such fence shall be permitted within such distance of a street or road intersection that it would be a hazard to the safety of vehicular traffic.

(h) No part of any building hereafter erected or structurally altered shall be located within one hundred ten (110) feet of the center line of the right-of-way of Lindbergh Blvd.

SECTION 15.

Board of Adjustment.

The Board of Adjustment established by Ordinance No. 96 is hereby continued. The word "Board" when used in this section shall be construed to mean the Board of Adjustment. The Board shall consist of five (5) members who shall be Freeholders appointed by the Mayor and approved by the City Council. The term of office of the members of the Board shall be for five (5) years. Vacancies shall be filled for the unexpired term only. Members shall be removed for cause by the Mayor and the City Council upon written charges and after public hearing.

The Board shall elect its own Chairman and Vice-chairman, who shall serve for one year. The Board shall adopt from time to time such rules and regulations as it may deem necessary to carry into effect the provisions of this ordinance.

Meetings: Meetings of the Board shall be held at the call of the Chairman and at such other times as the Board may determine. Such Chairman or, in his absence the Acting Chairman, may administer oaths and compel the attendance of witnesses. All meetings of the Board shall be open to the public. The Board shall keep minutes of its proceedings, showing the vote of each member upon each question, or if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall be immediately filed in the office of the Board and shall be a public record. All testimony, objections thereto and rulings thereon, shall be taken down by a reporter employed by the Board for the purpose.

Appeals: Appeals to the Board may be taken by any person aggrieved or by an officer, department, board or bureau of the City of Ladue affected by any decision of the Building Commissioner. Such appeal shall be taken within a reasonable time as shall be prescribed by the Board by general rule, by filing with the Building Commissioner and with the Board of Adjustment a notice of appeal specifying the grounds thereof, and by paying a filing fee of Five Dollars ($5.00) to the Building Commissioner at the time the notice is filed, which the Building Commissioner shall forwith pay over to the City Treasurer to the credit of the General Revenue Fund of the City of Ladue. The Building Commissioner shall forthwith transmit to the Board all the papers constituting the record upon which the action appealed from is taken.

An appeal stays all proceedings in furtherance of the action appealed from unless the Building Commissioner certifies to the Board after the notice of appeal shall have been filed with him that, by reason of facts stated in the certificate, a stay would, in his opinion, cause imminent peril to life or property. In such case, proceedings shall not be stayed otherwise than by a restraining order which may be granted by the Board or by a court of record on application or notice to the Building Commissioner and on due cause shown.

The Board shall fix a reasonable time for the hearing of the appeal, give public notice thereof, as well as due notice to the parties in interest, and decide the same within a reasonable time. Upon the hearing any party may appear in person or by agent or by attorney.

Jurisdiction: The Board shall have the following powers, and it shall be its duty:

(1) To adopt from time to time such rules and regulations as may be deemed necessary to carry into effect the provisions of this ordinance.

(2) To hear and decide appeals where it is alleged there is error in any order, requirment, decision or determination made by the Building Commissioner in the enforcement of this ordinance.

(3) To permit a variation in the yard and fence requirements of any district where there are practical difficulties or unnecessary hardships in the carrying out of these provisions due to an irregular shape of the lot, topographic or other conditions.

(4) To interpret the provisions of this ordinance in such a way as to carry out the intent and purpose of the plan, as shown upon the map fixing the several districts accompanying and made a part of this ordinance, where the street layout actually on the ground varies from the street layout as shown on the map aforesaid.

(5) To permit the erection and use of a building, or the use of a premises in any location for a public service corporation or for public utility purposes necessary to the public convenience or welfare.

(6) To determine whether any proposed manufacturing plant or establishment is obnoxious or offensive and not in accordance with the intent and spirit of this ordinance because of the omission of smoke, odor, noise or gas.

(7) To authorize upon appeal, whenever a property owner can show that a strict application of the terms of this Ordinance relating to the use, construction or alteration of buildings or structures or the use of land will impose upon him unusual practical difficulties or particular hardship, such variations of the strict application of the terms of this Ordinance as are in harmony with its general purpose and intent but only when the Board is satisfied that a granting of such variation will not merely serve as a convenience to the

applicant, but will alleviate some demonstrable and unusual hardship or difficulty so great as to warrant a variation from the comprehensive plan as established by this Ordinance, and at the same time the surrounding property will be properly protected.

In exercising the above mentioned powers the Board may, in conformity with the provisions of the law, reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination appealed from and may make such order, requirement, decision or determination as ought to be made, and to that end shall have all the powers of the Building Commissioner.

The concurring vote of four (4) members of the Board shall be necessary to reverse any order, requirement, decision or determination of the Building Commissioner, or to decide in favor of the applicant on any matter upon which it is required to pass under this ordinance, or to effect any variation in this ordinance.

Any person or persons jointly or severally aggrieved by any decision of the Board of Adjustment may present to the Circuit Court of St. Louis County, Missouri, a petition duly verified, setting forth that such decision is illegal, in whole or in part, and specifying the grounds of illegality. Such petition shall be presented to the Court within thirty (30) days after the filing of the decisions in the office of the Board.

Upon the presentation of such petition the Court may allow a writ of certiorari directed to the Board to review such decision of the Board and shall prescribe therein the time within which a return thereto must be made, and served upon the relator's attorney, which shall not be less than ten (10) days and may be extended by the Court. The allowance of the writ shall not stay proceedings upon the decision appealed from but the Court may, on application, on notice to the Board and on due cause shown, grant a restraining order.

The Board shall not be required to return the original papers acted upon by it, but it shall be sufficient to return certified or sworn copies thereof or of such portion thereof as may be called for by such writ. The return shall concisely set forth such other facts as may be pertinent and material to show the grounds of the decision appealed from and shall be verified.

If, upon the hearing, it shall appear to the Court that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take such evidence as it may direct and report the same to the Court with his findings of fact and conclusion of law, which shall constitute a part of the proceedings upon which the determination of the Court shall be made. The Court may reverse or affirm, wholly or partly, or may modify the decision brought up for review.

Costs shall not be allowed against the Board unless it shall appear to the Court that it acted with gross negligence or in bad faith, or with malice in making the decision appealed from.

SECTION 16.

Certificate of Occupancy.

No change in the use or occupancy of land, nor any change of use or occupancy in an existing building other than for single-family dwelling purposes, shall be made, nor shall any new, reconstructed or altered building be occupied for any purpose other than single-family dwelling use until a certificate of occupancy has been issued by the Building Commissioner. Every certificate of occupancy shall state that the new occupancy complied with all provisions of this Ordinance.

A record of all certificate of occupancy shall be kept on file in the office of the Building Commissioner, and copies shall

be furnished on request to any person having a proprietary or tenancy interest in land or a building affected by such certificate of occupancy.

SECTION 17.

Boundaries of Districts.

Where uncertainty exists with respect to the boundaries of the various districts as shown on the map accompanying and made a part of this ordinance, the following rules shall apply:

(a) The district boundaries are either streets or places unless otherwise shown, and where the designation on the map accompanying and made a part of this ordinance indicates the various districts are approximately bounded by street or place lines, said street or place shall be construed to be the boundary of such district.

(b) Where the district boundaries are not otherwise indicated and where the property has been or may hereafter be divided into blocks and lots, the district boundaries shall be construed to be lot lines and where the designation on the map accompanying and made a part of this ordinance indicates the various districts are approximately bounded by lot lines, said lot lines shall be construed to be the boundary of such district unless said boundaries are otherwise indicated on the map.

(c) In unsubdivided property the district boundary lines on the map accompanying and made a part of this ordinance shall be determined by use of the scale contained on such map.

SECTION 18.

Plats.

Applications for building permits shall be accompanied by a drawing or plat, in duplicate, showing the lot plan; the location of the building on the lot; accurate dimensions of building and lot and such other information as may be necessary to provide for the enforcement of these regulations. In the case of property not platted of record, all drawings or plats shall be based upon a survey executed and signed by a reputable, experienced surveyor. A careful record of the original copy of such applications and plats shall be kept in the office of the Building Commissioner.

SECTION 19.

Changes and Amendments.

The City Council may from time to time, on its own motion or on petition, after at least fifteen (15) days' public notice and hearings as provided by law, amend, supplement or change, modify or repeal the boundaries or regulations herein or subsequently established, after submitting same to the Planning Commission for its recommendations and report. In case, however, that the Planning Commission disapproves the change, or of a protest against such changes duly signed and acknowledged by the owners of ten per cent (10%) or more, either of the area of land (exclusive of streets and places) included in such proposed change, or within an area determined by lines drawn parallel to and one hundred and eighty-five (185) feet distant from the boundaries of the district proposed to be changed, such amendment shall not become effective except by the favorable vote of three-fourths (¾) of all the members of the City Council.

SECTION 20.

Enforcement, Violation and Penalty.

It shall be the duty of the Building Commissioner to enforce this ordinance. Appeal from the decision of the Building Commissioner may be made to the Board of Adjustment as provided in Section 15.

The owner or agent of a building or premises in or upon which a violation of any provision of this ordinance has been committed or shall exist; or the lessee or tenant of an entire building or entire premises in or upon which violation has been committed or shall exist, or the agent, architect, building contractor or any other person who commits, takes part or assists in any violation or who maintains any building or premises in or upon which such violation shall exist, shall be guilty of a misdemeanor punishable by a fine of not less than Ten Dollars ($10) and not more than One Hundred Dollars ($100) for each and every day that such violation continues, but if the offense be willful, on conviction thereof the punishment shall be a fine of not less than One Hundred Dollars ($100) nor more than Two Hundred Fifty Dollars ($250) for each and every day that such violation shall continue, or by imprisonment for ten (10) days for each and every day such violation shall continuue or by both such fine and imprisonment, in the discretion of the Court. Any such person, having been served with an order to remove any such violation, failing to comply with said order within ten (10) days after such notice or continuing to violate any provision of the regulations made under authority of this ordinance in the respect named in such order, shall also be subject to a civil penalty of Two Hundred and Fifty Dollars ($250).

SECTION 21.

Validity.

If any section, subsection, sentence, clause or phrase of this ordinance is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this ordinance.

SECTION 22.

Conflicting Ordinances Repealed.

Any ordinances or parts of ordinances in conflict are hereby repealed, except the provisions of the Building Ordinance of the City of Ladue, being Ordinance No. 100 and Ordinances No. 263 and No. 271 amending said Ordinance No. 100.

SECTION 23.

Superseded Ordinances Repealed.

Ordinance 96 (Zoning Ordinance) and Ordinances No. 122, No. 157, No. 197, No. 213, No. 215, No. 217, No. 229, No. 235, No. 243 and No. 278, being amendments to said Ordinance 96 are hereby superseded and repealed.

SECTION 24.

When Effective.

This ordinance shall be in full force and effect from and after its passage as provided by law.

PASSED THIS 19th DAY OF JULY, 1948.

(Signed) ALVAN J. GOODBAR,
President of the City Council
and Acting Mayor.

APPROVED THIS 19th DAY OF JULY, 1948
(SEAL)

(Signed) ALVAN J. GOODBAR,
President of the City Council
and Acting Mayor.

ATTEST:

(Signed) A. CLIFFORD JONES,
City Clerk.

MAPS
TOO
LARGE
FOR
FILMING

EXHIBIT "B"

POINTS RELIED ON

I

A. The Zoning Ordinance of the City of Ladue No. 282 shows on its face that the use and area limitations imposed on plaintiff's 104 acres in "District A" (to not less than 3 acres per family dwelling and forbidding use for institutions but not for private clubs) are unreasonable and not based upon imperious considerations of public health, morals and safety and have no substantial relation to a public object within the scope of the police power of the City of Ladue.

See District Map, part of Ordinance in Appendix to this Brief;
Also Secs. 2, 3 and 9. Cf. Secs. 4, 5, 10, 11, 12;
Note variations in use and area regulations in A, B, C, D and E Districts; also section 14 (b) and (f).

B. The record in this case reflects that the zoning of plaintiff's land under the use and area restrictions of "District A" do not bear substantial relation to the public health, safety, morals or general welfare of the Community and therefore are invalid as applied to plaintiff.

Nectow v. Cambridge, 277 U. S. 183, 188, 72 L. Ed. 842, 844;
Pennsylvania Coal Co. v. Mahon et al., 260 U. S. 293, 67 L. Ed. 322;
Welch v. Swasey, 214 U. S. 91, 105;
Washington ex rel. v. **Roberge**, 278 U. S. 116, 121, 73 L. Ed. 210, 213.

C. The difference between the valid exercise of the police power and an unlawful taking without compensation is a matter of degree. When the enactment has no substantial relationship to public health, safety or morals, as in this case, and where the record shows that as a consequence the plaintiff has suffered a loss in value of its property, variously estimated from $80,000 to $166,000, without compensa-

tion, there has been a violation of both the Fourteenth Amendment to the Constitution of the United States and of Article I, Sec. 10, of the Constitution of Missouri; also of Article I, Sections 26 and 28, of the Constitution of Missouri.

People v. Calvar Corp. et al., 286 N.Y. 419, 36 N. E. 2d 644;
Pennsylvania Coal Co. v. Mahon et al., 260 U. S. 293, 67 L. Ed. 322.

D. The restriction against the use of plaintiff's land for institutional purposes is highly unreasonable.

State ex rel. Synod of Ohio United Lutheran Church of America v. Joseph et al., 139 Ohio St. 229, 39 N. E. 2d 515 (1942), Sup. Ct. of Ohio;
Women's Kansas City St. Andrews Society v. Kansas City, Mo., 58 F. 2d 593, 603, 605;
Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U. S. 116, 121, 73 L. Ed. 210, 213;
Village of University Heights et al. v. Cleveland Jewish Orphans Home, 20 F. 2d 743, 745.

(1) Section 8 of the Ordinance of the City of Ladue, which entitles one to petition for a change in the ordinance by the obtention of a "permit" from the City Council for certain kinds of institution uses, does not make the legislative restriction on use of plaintiff's property any more reasonable. In fact, the provisions of Section 8 are more onerous for the obtention of a "permit" than for an amendment of the ordinance. Cf. Section 19. Section 8 is without statutory authority and not in conformity with the Enabling Act of the State of Missouri.

(Sec. 89.060, R. S. Mo. 1949.)

(2) Section 8 of the Ordinance of the City of Ladue does not set up any legislative standards to govern the granting of the so-called "permit". Furthermore, the caprice or prejudice of neighbors within 1000 feet may determine the vote requisites for permit authorization. These prior re-

straints are repugnant to the 14th Amendment of the U. S. Constitution.

State ex rel. Nigro v. Kansas City, 27 S. W. 2nd 1030, 1032, 325 Mo. 95;
Women's Kansas City St. Andrews Society v. Kansas City, Mo., 58 F. 2d 593, 603, 605;
Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U. S. 116, 121, 73 L. Ed. 210, 213.

(3) Section 8 of the Ordinance of the City of Ladue demonstrates on its face that restrictions against institutional use are not indispensable to the general zoning plan as the Council can relax (by "permit" spot zoning) such restrictions in the A, B or C Districts, and it is thereby in contravention of the 14th Amendment of the U. S. Constitution.

Women's Kansas City St. Andrews Society v. Kansas City, Mo., 58 F. 2d 593, 603, 605;
Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U. S. 116, 121, 73 L. Ed. 210, 213;
Nectow v. Cambridge, 277 U. S. 183, 186, 72 L. Ed. 842, 844.

(4) Spot zoning is the very antithesis of comprehensive zoning and amounts to class legislation, and is none the less invalid when "permitted" rather than legislated.

Yokley, Zoning Law & Practice, Sections 85 and 86, p. 159 et seq.;
Mueller v. Hoffmeister Undertaking & Livery Co., 348 Mo. 430, 121 S. W. 2d 775.

II

A. This Court is not bound by mere forms or pretenses. It has a duty to look at the substance of things whenever it enters upon the inquiry of whether a legislature has transcended the limits of its authority. The Ordinance and the record in this case demonstrate the City of Ladue under the pretext of a valid exercise of police power has sought to maintain and expand a most exclusive estate district, available for future residences to only the opulent, in which citi-

zens in modest circumstances could not afford to build, and that it has partially confiscated property of the plaintiff (by an unreasonable restraint on its use) for ulterior purposes.

Article 1, Sec. 28, Constitution of Missouri;

Sulgrave Realty Co. v. Huntleigh Village, U. S. District Court Eastern Div. of the Eastern Dist. of Mo., Equity #9401 (1934). Opinion, not reported but excerpts of Findings of Fact, Conclusions of Law and Final Decree entered by Judge C. B. Faris are set out in Appendix to Brief;

Elizabeth Lake Estates et al. v. **Waterford Tp.**, 317 Mich. 359, 26 N. W. 2d 788, 792 (Sup. Ct. en banc 1942);

American Veterans Housing Cooperative, Inc., v. Zoning Board of Adjustment, 69 D. & C. 449 (1949 Pa.);

Lionshead Lake, Inc., v. Wayne Township, 73 A. 2d 287, 288, 8 N. J. Sup. 468 (1950);

Women's Kansas City St. Andrews Society v. Kansas City, Mo., 58 F. 2d 593, 603;

Miller v. Seaman et al., 137 Pa. S. 24, 8 A. 2d 415;

Pfister v. Municipal Council of City of Clifton, 133 N. J. L. 148, 43 A. 2d 275, 278;

Strain v. Mims, 193 A. 754, 123 Conn. 275 (Sup. Ct. of Error);

Mugler v. State of Kansas, 123 U. S. 633, 661, 21 L. Ed. 205;

Trust Company of Chicago v. City of Chicago, 96 N. E. 2d 499, 505, 506 (Ill. Sup. 1951), 408 Ill. 91.

B. The classification of plaintiff's 104 acres in "District A" is a restrictive covenant in disguise against the use of its property by people of moderate means or humanitarian institutions, in violation of the Fourteenth Amendment to the Constitution of the United States, which forbids legislative discrimination based on invidious standards.

Women's Kansas City St. Andrews Society v. Kansas City, Mo., 58 F. 2d 593, 603, 604;

City of Sherman v. Simms, 183 S. W. 2d 415 (Texas Sup.);

Elizabeth Lake Estates et al. v. **Waterford Tp.**, 317 Mich. 359, 26 N. W. 2d 788, 792 (Sup. Ct. en banc 1942);

American Veterans Housing Cooperative, Inc., v. Zoning Board of Adjustment, 69 D. & C. 449 (1949 Pa.);

Lionshead Lake, Inc., v. Wayne Township, 73 A. 2d 287, 288, 8 N. J. Sup. 468 (1950);

Village of University Heights v. Cleveland Jewish Orphans Home, 20 Fed. 2d 743, 745.

C. The present claim by the City of Ladue that the property of the plaintiff was classified in "District A" pursuant to the purposes and designs of the Enabling Act is convenient but bears scrutiny. There was no compelling public necessity requiring an abridgement of the property rights of the plaintiff as herein objected to, nor was the placing of plaintiff's tract of unimproved land designed to regulate the density of population within the intent of the Enabling Act (Sec. 89.020, R. S. Mo. 1949). If the Enabling Act is construed to authorize the classification of plaintiff's land in "District A" under the facts and circumstances herein, then it is invalid and repugnant to Article I, Section 10, and Article I, and Section 26 of the Constitution of Missouri, and the Fourteenth Amendment of the U. S. Constitution.

Northwest Merchants Terminal v. O'Rourke, 60 A. 2d 743 (1948, Ct. of Appeals Md.).

III

The contention in defendant's answer that the plaintiff cannot press its constitutional attack upon the Ordinance because it failed to exhaust "administrative remedies" by not petitioning the Zoning Commission or Zoning Board of Adjustment or the City Council for any change of relief from the Ordinance is without merit. One does not have to indulge in futilities before the rights guaranteed under the Constitution apply. The Ordinance constitutes a pres-

ent invasion of plaintiff's property rights and a "prior restraint" in contravention of the Fourteenth Amendment.

Euclid v. Ambler Realty Co., 272 U. S. 365, 386, 71 L. Ed. 303;

Lovett v. Griffin, 303 U. S. 448, 452, 453, 82 L. Ed. 949, 954;

State ex rel. Nigro v. Kansas City et al., 27 S. W. 2d 1030, 1032, 325 Mo. 95;

See Plaintiff's Ex. H (Tr. 168), a letter of protest to the Mayor of Ladue.

EXHIBIT "C"

IN THE SUPREME COURT OF MISSOURI

Court En Banc

January Session, 1952

No. 42,103

FLORA REALTY AND INVESTMENT COMPANY, a corporation, *(Plaintiff) Appellant*

v.

CITY OF LADUE, a municipal corporation, *(Defendant) Respondent*

Appellant's Motion for Rehearing and Suggestions in Support Thereof

Now comes the Appellant in the above matter and moves for a rehearing of its appeal for the following reasons:

A. Material matters of fact contained in the Record of over 500 pages and in various Exhibits were inadvertently overlooked or misinterpreted in the Opinion of this Court, decided some 12 days after submission. Details are set out below.

B. Material matters of law and citations in Appellant's Brief and in oral argument were inadvertently overlooked or misinterpreted. Details are set out below.

A. Re Facts

1. The fact that the Ordinance permits the unlimited utilization of land in District "A" for *"private clubs"* (See District Map in Appendix) was not mentioned anywhere by the Court. It was pointed out in oral argument that although residences for a single family are restricted to a minimum of three acres, that a private club can be built *on any size area in District "A"*. Section I of the Ordinance defines a *"Private club"* as a "building or area used for social purposes only, including the serving of food and refreshments, whose normal use is limited to members of the club and their guests, and which club does not provide a service customarily carried on as a business."

2. The reference in the Court's Opinion on page 3, to Institutions of a philanthropic nature being permitted in "D" and "E" residence districts, and "F" (commercial) and "G" (industrial) districts inaccurate. Philanthropic Institutions, such as Hospitals, Orphanages, Homes for the Aged, the Crippled or Blind, *are not permitted anywhere* in the City of Ladue except by special permit, governed by procedure outlined in Section 8 of the Ordinance. (See Clauses 1 and 2 on page 16 of Ordinance contained in Appendix and compare with Clauses 2 and 3 on pages 10 and 11 of same Ordinance.) The same misconception is repeated through implication on page 15 of the Opinion, *as if Institutions of all categories* are permitted in Districts "D", "E", "F" and "G".

3. The fact that City Ordinance No. 282 repealed and superseded all previous zoning ordinances rather than amended them is not recited but instead the Opinion on page 3 refers to the Ordinance of July 1948 as an *amended Ordinance*. (See Section 23 on page 34 of Ordinance in Appendix for the facts.)

4. The summary of the acreage contained in the City of Ladue set out on page 6 of the Opinion is inaccurate. The acreage therein stated, (4532.78) was as of the time of the

inception of the City in 1937. However, in November 1947, 626 additional acres were incorporated by the City, including some 86 acres added to the "A" District, thus making for an area of over 1000 acres in District "A", exclusive of contiguous Country Clubs in District "B". (See Tr. page 370, District Map.)

5. The Court failed to include in its summary of facts, that the population of the City of Ladue according to the latest census figures contained *only* 5614 persons.

6. The fact that there was a lively demand for homes in "C" Districts of Ladue (Tr. 103, 104, 258, 259) and a faster rate of development for home owners in such districts than in the "A" District, was not noted by the Court, nor the relatively slow development in District "A" with its high priced lots, despite the pressure for space of a swelling population in the St. Louis metropolitan area.

7. The Court inadvertently misinterpreted the Record when it stated on page 14 of its Opinion, "Appellant concedes that 'mansions, ordinary homes and farm houses are all in the same area' in the 'A' District." The language quoted by the Court conveys an erroneous impression of what the record shows and what Appellant was referring to. The ordinary homes and farm houses were cited as evidence that the development of mansion sites in the past was not dependent upon the creation of a District "A", because the past development of estates had sufficient acreage to create their own neighborhoods. None of the ordinary homes and farm houses were built after the "A" Districts were created. The Court failed to realize that their vestigial existence did not reflect a trend toward moderate priced developments in District "A", or the influx of the thriftier persons on extravagant homesites. The absolute lack of new development in District "A" for those of moderate means points up that District "A" accomplished the result intended.

8. The Court in stating the Ordinance was not viewed as an attempt to segregate economic classes by zoning failed to give effect to the following uncontradicted testimony in the Record, stemming from the lips of the Chairman of the Zoning Commission. After describing his own dwelling on

a seven acre site as being 110 feet in length and containing 4 bedrooms, 3 maid rooms, living room, dining room, kitchen and a number of baths, he admitted "I don't think everybody could afford to buy a large acreage for home purposes" (Tr. 398).

Earlier he testified as follows:

"Q. Was it part of the purpose and plan to decrease the amount of space that would be available for people of moderate circumstances?

"A. No, sir.

"Q. Didn't you do that for the people of Ladue?

"A. In good zoning, it is my opinion you must provide for different segments of the population.

"Q. And aren't the people of moderate and poorer circumstances entitled to as fine an environment as the rich people?

"A. I am not able to answer that question" (Tr. 382).

Later Mr. Waltke (the Zoning Chairman) testified:

"Q. Then why do you have any districts that have less than three acres as an indispensable minimum?

"A. We must provide for several segments of people, what they can afford. We are not trying to keep anybody out of Ladue. We are trying to zone it for five classifications of zoning, which permit many classes of population, any class of people to come out there and live.

"Q. Aren't you trying to keep them out of this district, the moderate, or poor class?

"A. We don't talk of classes—I probably made a mistake."

In addition, the Court seemingly overlooked the uncontradicted testimony of Horatio Potter, a witness for the City (Tr. pp. 469, 470).

"Q. . . . Do you know of many people who can afford to pay eleven thousand or more for a homesite, for just a homesite?

"A. Oh, that is relatively a small part of the population, yes.

"Q. That would restrict the neighborhood to people who have comparatively large means, or larger means than most people?

"A. It would tend in that direction.

"Q. And if a thrifty person of responsibility could afford to buy one acre, this zoning would keep them out of this area?

"A. Unless he wanted to go into an area where there are no restrictions.

"Q. What is that?

"A. In a financial way, he would be limited in that area. . . ."

Also see testimony of O. K. Brichler, President of Shaw & Francis, Inc., Tr. 148.

"Q. Do you know why any people in moderate circumstances are not entitled to the same advantage in picking a site, as people who can afford to buy three acres or more?

"A. No, sir.

"Q. Do you know of any reason why they are not as entitled to light and the fresh air that exist in the area of Litzinger and Lindbergh, than people who can afford to buy three acres?

"A. No, sir.

"Q. Would it take less money to buy a home site of three quarter acres as distinguished from three acres minimum?

"A. Definitely."

T. L. Coleman, Vice-President of Shaw & Francis, Inc. testified Tr. 121.

"Q. Does it take more money for a building site assuming you buy three acres, as distinguished from one acre or three-quarters?

"A. Yes, sir, definitely.

"Q. And does that restrict the type of potential user of that ground?

"A. That is right, it does."

9. The Court apparently failed to take cognizance of the facts in the Record with reference to the sparsity of development, old or new, adjacent to and contiguous with the various boundaries of Appellant's large and unimprovod tract of land. (See pages 7 and 8 of Appellant's brief filed before this Court). Hundreds upon hundreds of acres remain undeveloped under the sterile effect of District "A" zoning while the growing population of the St. Louis metropolitan area is clamoring on all sides of the City of Ladue for reasonable living space. What the community needs, (a matter of judicial cognizance), is living places for more people, not less space for such purposes reserved by law for only the wealthy.

10. Focal facts were overlooked by the Court with reference to questions *necessarily involved in this case* and particularly pertaining to the issue of restrictions on institutional use which the Opinion states (page 15) is not brought "to exact focus".

The section of the ordinance under attack forbids any institutional use in District "A". An issue was made as to the validity of said restriction in plaintiff's petition. (See clause 6 (b), pages 4 and 5 of appendix.) The City of Ladue in its answer attempted to meet the attack by alleging in Clause 8 of its answer (see appendix page 10) that the plaintiff had not exhausted its administrative remedies by petitioning for a change in or relief from any particular hardship resulting from the application of the zoning ordinance to the property in question. The respondent took the position at the trial that Section 8 of the zoning ordinance permits institutional use of property in any district upon written application to the City Council, proper showing of need, etc. The respondent in its brief on pages 4 and 41 also calls attention to Section 8 of the zoning ordinance and asserts it as a bar to plaintiff's right to relief in Court. The Transcript on pages 133, 134 and 158 also confirms that the pertinency of said Section 8 of the ordinance and the question of the right to sell or use the property in institutions was an issue in the case.

The validity of the restrictions upon institutional use of appellant's ground, and the question of whether Section 8

of the ordinance (see pages 15 and 16 of zoning ordinance contained in appendix) is valid is necessarily involved in the case before this Court.

Its existence and scope is twice detailed in the Opinion (pages 3 and 15). Section 8 was deemed material in the Court's factual summary of the various restrictions on Institutions in the City of Ladue as if a saving grace. But the invalidity of Section 8 stands out on the face of the Ordinance like a red nose.

B. Re the Law

1. The Court overlooked that such invalidity[1] on the face of Section 8 made it unnecessary for a permit to be requested thereunder. See 16 C. J. S. Section 76, note 80; Lovell v. Griffin, 303 U. S. 448, 452, 453, 82 L. Ed. 949, 954. Also see Western Theological Seminary v. City of Evanston, 156 N. E. 778, 784.[2]

In *Euclid v. Ambler Realty Co.*, 272 U. S. 365, 71 L. Ed. 303, the Court held that it was unnecessary for the complainant to obtain a building permit or to apply to the Zoning Board of Appeals for relief under the terms of the ordinance *as a condition of its right to file a bill in equity* to enjoin the enforcement of the *ordinance*. It stated, l. c. 386:

> "Assuming the premises, the existence and maintenance of the ordinance in effect constitutes a present invasion of appellee's property rights and a threat to continue it. Under these circumstances the equitable jurisdiction is clear." (Cases cited.)

2. The Court overlooked that the invasion on Appellant's right to use its property for *any* institutional pur-

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[1] (a) As to lack of standards; (b) as to power to discriminate on use in District; (c) as to nonconformity with Enabling Act; (d) as to provisions for spot zoning by permits; (e) as to dispensability of restrictions to comprehensive zoning plan; (f) as to owners' uses, in a measure, being dependent on caprice of neighboring owners.

[2] Cited on Page 25 of Appellant's Brief filed herein but not mentioned in Court's Opinion and seemingly overlooked.

poses gave it the right to complain. There is nothing hypothetical about the injury suffered.

Euclid v. Ambler Realty Co., supra, by the clearest inference supports Appellant's position. In that case the Court refused to pass on the question of the validity of the Ordinance insofar as it contained restrictions relating to churches, schools, libraries, etc. "because there was nothing in the record to suggest that any damage results from the presence in the ordinance of these restrictions . . ." The Court said that it was neither alleged nor proved "that there is or may be a demand for any part of Appellee's land for any of the last named uses . . .". (The record there reflected industrial and commercial uses for the land. 272 U. S. l. c. 385.)

However, in this case, there was substantial testimony as to the adverse effect upon the valuation of plaintiff's land because of the institutional restrictions. The realities of the damage in value and marketability because of the restrictions on the right to use of the property for *any* institutions is so amply supported by the Record that the Court's reference in the Opinion to hypothetical issues because of a lack of specification of a *particular* institutional use leads us to conclude that the Court failed to bear in mind the following uncontradicted facts in evidence. On page 64 the Record shows that Enno Kraehe, an appraisal expert, stated that if the property were available for institutional use it was worth as much as the 33 acres to the west, which was recently sold for institutional use, that is for $2100.00 an acre; that plaintiff's ground was quite suitable for such purpose (Tr. 133, 134). He further stated he thought the property as restricted was worth no more than $1200 per acre (Tr. 64).

T. L. Coleman, a realtor of great experience, was asked whether plaintiff's property could be used for institutional use and he stated that, "It could be very well, indeed" (Tr. 119). On page 125 the same witness testified that "there was no interest in plaintiff's tract for over a year for the reason that we were unable to open it for institutional use". On pages 126 and 127 we find that the witness testified that a limitation of the possibility of putting in an institution on

the tract was a distinct detriment to the marketability of the ground and that in his opinion the property was worth, as restricted, between $1,000 and $1,100 an acre, whereas without restrictions on the right to put in institutions it was worth $2500 an acre.

Another witness whose integrity is unassailable, O. J. Brichler, President of Shaw & Francis, Inc., testified that the marketability of plaintiff's tract had been adversely affected 60% because zoned for 3 acres and restrictions on institutional use (Tr. 147, 164.)

From the foregoing record facts showing damage because of institutional restrictions, *the validity of Section 8 of the ordinance*, invoked by the Respondent by way of confession and avoidance, is necessarily to be determined in order to dispose of the defense of respondent on the institutional question.

3. The Court overlooked the rule recognized in *State v. Armour Pharmacy*, 152 S. W. 2nd 67, 68 (Mo. Div. 2), that "where the invalidity of questioned sections or parts of statutory enactments result in also striking down the provision of the law adversely invoked against the litigant, the litigant is in a position to successfully interpose constitutional safeguards . . ." 16 C. J. S. Sections 76 and 84 were cited in support by the Court. With reference to Section 76, we call particular attention to Notes 67 and 68 on page 165, and with reference to Section 84, to Notes 73 and 74 on page 177. They are to the effect that a person may question the constitutionality of *any* provision of a statute where the invalidity of such provision would render the entire act or at least the portion thereof affecting him void.

4. The Court overlooked many cases cited by the Appellant in its last brief. We therefore direct attention to the following cases and authorities overlooked in the Opinion which contain controlling principles that should have led to a material revision of the Court's conclusions on one or more of the law issues.

Sulgrave Realty Co. v. Huntleigh Village, U. S. Dist. Court, Eastern Dist. of Mo., set out in Appendix to brief;

Pennsylvania Coal Co. v. Mahon, et al., 260 U. S. 293, 67 L. Ed. 322;

Ingersoll v. Village of South Orange, N. J., Sup. 128 A. 393;

State ex rel. Nigro v. Kansas City, 27 S. W. 2nd 1030, 1032, 325 Mo. 95;

Northwest Merchants Terminal v. O'Rourke, 60 A. 2nd 743, 745;

State ex rel. Roman Catholic Bishop of Reno v. Hill, 90 P. 2nd 217;

Miller v. Hoffmeister Undertaking and Livery Co., 348 Mo. 430, 121 S. W. 2nd 775;

Elizabeth Lake Estates, et al. v. Waterford Tp., 317 Mich. 359, 26 N. W. 2nd 788, 792, Mich. Sup. Ct. en banc.;

Trust Company of Chicago v. City of Chicago, Ill., Sup. Ct. 1951, 96 N. E. 2nd 499, 505, 506, 408 Ill. 91;

City of Sherman v. Sims, 183 S. W. 2nd 415, Tex. Sup.;

Lovell v. Griffin, 303 U. S. 448, 452, 453, 82 L. Ed. 949, 954;

Western Theological Seminary v. City of Evanston, 156 N. E. 778, 784;

Page v. City of Portland, 165 P. 2d, 280;

Bassett on Zoning, p. 72;

Yokley, Zoning Law and Practice, Secs. 85 and 86, p. 159 et seq.

In Conclusion

A rehearing is urgently requested so that the matters of fact and law inadvertently overlooked or misinterpreted can be carefully evaluated and an appropriate Opinion written in the light of such considerations.

Respectfully submitted,

VICTOR PACKMAN,
Attorney for Appellant.

St. Louis, Missouri., Feb. 26, 1952.

EXHIBIT "D"

IN THE SUPREME COURT OF MISSOURI EN BANC, JANUARY SESSION, 1952

No. 42,103*

FLORA REALTY AND INVESTMENT COMPANY, a Corporation, Appellant,

vs.

CITY OF LADUE, a municipal corporation, Respondent

Appeal from the Circuit Court of St. Louis County

Hon. John A. Witthaus, Judge

Opinion

Action in equity to have zoning ordinance No. 282 of the city of Ladue declared unconstitutional and void insofar as it restricts the use of plaintiff's property. Plaintiff is the owner of approximately 104 acres of real estate (acquired in 1911) in said city and the zoning ordinance placed this property in the "A" three acre minimum area one family residence district, wherein institutional use is forbidden except by special permit, as provided in said ordinance. Plaintiff charged that the ordinance, insofar as it classified plaintiff's property in District "A" and restricted the use thereof, was unreasonable, arbitrary, discriminatory, void and unconstitutional; that the classification of plaintiff's property in District "A" and the restrictions on use and area imposed thereby were "without relationship to the needs of the health, safety, morals and general welfare of citizenry (present and future) of Ladue"; that the classification and restrictions adversely affected the marketability and value of plaintiff's property; and that under said ordinance plaintiff's property was taken and damaged without compensation and without due process of law. After a hearing, the trial court found the issues for defendant and dismissed plaintiff's petition. Plaintiff has appealed.

Respondent is a municipal corporation, duly organized and existing under the laws of this state and is a city of the fourth class, located in St. Louis county. It was formed in 1936 by the consolidation of three villages, Deer Creek, Ladue and McKnight. Appellant's real estate is located in the southwest section of the city a short distance south of Litzinger Road and between Lindberg Boulevard and Warson Road. It fronts 1676 feet on Lindberg and about 800 feet on Warson. On its south and west boundaries it adjoins Huntleigh Village, which also has 3 acre minimum area one family residence zoning restrictions. Appellant's property is completely surrounded on all sides by real estate similarly zoned and restricted.

The eastern portion of appellant's property (approximately 54 acres) was in the village of Deer Creek, which in 1934 adopted a zoning ordinance with 3 acre minimum area one family residence restrictions. After the consolidation, the city of Ladue in 1938 adopted a zoning ordinance and the 3 acre minimum area one family residence restrictions as to this portion of appellant's property were continued in force. In November 1946, that part of appellant's property then outside of the city of Ladue was subjected to a county zoning order providing for one acre minimum area one family residence use and allowing institutional use. In November 1947, the city of Ladue extended its western boundary line to Lindberg Boulevard and its south boundary to the corporate limits of Huntleigh Village and, in so doing, annexed the remaning portion of appellant's property. In July 1948, the 3 acre minimum area one family residence restrictions were extended by an amended ordinance to cover the annexed portion of appellant's property. So far as the record shows no objections had theretofore been made to the 3 acre minimum area one family residence restrictions previously imposed on the eastern part of appellant's property. This action was instituted in November 1948.

By the terms of ordinance No. 282 all land embraced in the city limits is divided into seven districts. The ordinance places appellant's property in District "A," subject to use and area limitations, towit, for residential purposes with

a minimum of 3 acres per family. The minimum area per family for District "B" is 1.8 acres, for District "C," 30,000 square feet (approximately ¾ of an acre), for District "D" 15,000 square feet, for District "E" 10,000 square feet and, in District "F" a family may dwell on the second floor of any commercial structure on a lot fronting 25 feet or more on a street even though the lot contains less than 10,000 square feet. Schools, churches and institutions of an educational, religious or philanthropic nature are only permitted in "D" and "E" residence districts, "F" (Commercial) and "G" (Industrial) districts, except by special permit governed by procedure outlined in Section 8 of the ordinance.

Appellant's evidence tended to show that approximately one hundred acres of its property is unimproved. "It is gently rolling in spots and it has an elevated eminence throughout its area" with the grade sloping "perhaps not too gently" down from Lindberg and Warson Roads. The best use of the property would be for residential purposes on one acre or less and it could very well be used for institutional purposes. The most marketable and most advantageous way to dispose of it to produce the greatest good would be to subdivide it into parcels of one acre or less. Real estate in the Village of Frontenac, which lies on the west side of Lindberg Boulevard and immediately to the north of the north line of appellant's property, is zoned for one acre residence use and the real estate east of Lindberg in Ladue and north of Litzinger is developed on one acre or less though zoned for 1.8 acres. It is possible to isolate a home on one acre or less. One acre is plenty to afford sufficient protection, since the average 7, 8 or 9 room house has about three thousand square feet of floor space and ten to fifteen times that area surrounding the house would be plenty of space for sunshine and air. About 20% of purchasers buy more than one lot. If more area is desired it may be purchased. In many acres in the city of Ladue septic tanks are considered safe and permissible as far as health is concerned. On the property south of Litzinger, between Warson and Lindberg the back ends of larger lots have grown up wild, as wasteland. Appellant's

property is of sufficient area to lend itself very well to making its own neighborhood. Under good planning you can make a community out of 20 acres. It is possible to run roads from Lindberg east into appellant's property without servicing from Warson and Litzinger. Lindberg is a national highway carrying a lot of traffic. It could easily handle the traffic of home owners on ¾ acre lots and "quite a few" entrances could be made from appellant's property into Lindberg Boulevard. There is no practical reason that the area fronting on Lindberg couldn't be arranged for traffic entering and leaving by the west. Eighty homes or so would not add to the load on Warson and Litzinger Roads so as to create congestion. Litzinger could be widened and improved. Appellant's property is large enough to be subdivided into several distinct types of property all independent of each other. There is a sanitary sewer along Warson Road for some distance bordering appellant's property. If the sewer is adequate it wouldn't make any difference if there were 100 families on plaintiff's tract. There would be little difference in the school facilities required. The 3 acre minimum zoning restriction definitely and adversely affects the value of appellant's property and takes away about $800 per acre of its value. The property under 3 acre zoning is worth not more than $1200 per acre in bulk. There is much more 3 acre zoned land in the vicinity than is being absorbed or will be absorbed for quite some time. There is a lot of vacant property, appellant's property will be very difficult to sell subject to 3 acre zoning and it couldn't be sold from a practical standpoint. Three acre and larger developments to the west in Huntleigh Village have been very slow and have not been sold out or built up in 13 or 14 years. A fifteen acre tract at the southeast corner of the intersection of Lindberg and Litzinger and a ten acre tract further east, both between Appellant's property and Litzinger Road are vacant and unimproved. The effect of a development comprising one acre or less residence lots would not hurt the surrounding property but would probably be a benefit, because the neighborhood was being developed. If the 104 acres were permitted to be sold in ¾ acre residence tracts

or for institutional purposes it could be sold profitably. If platted and sold in 3 acre tracts it would take so long in marketing that it would be a loss to the organization handling the development.

There was evidence that appellant's land was worth $2500 per acre with one acre zoning, but not worth one-third of that if it had to be used subject to the 3 acre restriction. It is not worth over $1000 to $1100 per acre under present zoning, according to other witnesses. There are institutions and schools in Ladue which do not injure adjacent high grade developments. The 3 acre minimum area restrictions and the limitations on the possibility of putting any part of the property to institutional use are a distinct detriment to the marketability and value of appellant's property. If zoned into ¾ acre tracts or available for institutional purposes it would be worth $2500 per acre to a wholesale buyer, but a wholesale buyer could not handle it profitably with present restrictions. Smaller parcels for residential use would command a higher price and be more saleable because the ordinary buyer is not interested in a parcel larger than that which is adequate for a proper home site. The cost of a home site is increased when the least a person can buy in the area is 3 acres, as distinguished from a smaller parcel. The development of appellant's property into ¾ acre lots and part institutional would not depreciate surrounding value, but would add value to the surrounding area as a residential development. There are placed in the city of Ladue where District "A" is adjacent to District "D" or other districts without preference. The development of homes on ¾ acre tracts on appellant's land would not increase fire insurance rates as distinguished from homes on 3 acre tracts. There was other evidence that appellant's property was worth 40% less on the market in 3 acre tracts than if zoned for ¾ acre use and worth 60% less if it had to be sold in bulk for 3 acre use.

Respondent's evidence tended to show that the St. Louis Metropolitan area had a population in excess of 1,680,000 persons; that in recent years the trend of the population movement had been into suburban areas; that St. Louis

county had grown more rapidly in population than the city of St. Louis; that the city of Ladue was located directly west from the central area of the city of St. Louis and directly in the path of the better residence development; that the city contained only a limited amount of commercial and industrial development, but represented about the finest residential development of the entire metropolitan area; that the development of individual transportation had had the effect of dispersing population over much wider areas; that after the incorporation of the city of Ladue a study of population density revealed different types of residential development, with the community devoted largely to single family, individually owned residences on lots of various sizes, but with large lots as a predominating characteristic; that a complete and comprehensive zoning plan based upon existing and future needs had been adopted; and that the city contained 4532.78 acres divided into five residential districts, a commercial and an industrial district, towit, "A" district 990.27 acres, "B" district 1450.31 acres, "C" district 794.84 acres, "D" district 307.26 acres, "E" district 77.84 acres, "F" district (commercial) 15.22 acres, "G" district (industrial) 127.12 acres and the remaining area, included parks, golf courses, open areas and roads. Only in the city of Ladue and the adjacent Huntleigh Village is protection afforded for those who wish to develop 3 acre or larger residential tracts. Practically all of the existing development on four sides of appellant's property had been on 3 acre or larger tracts. Three acre tracts and larger have been developed and improved both east and west of Warson Road and north and south of Litzinger Road. There are no zoning restrictions on the type of dwelling houses in District "A", or on the cost or size of the improvements. Nor are there deed restrictions on the property in the vicinity of Warson and Litzinger.

In locating appellant's property in the "A" district, the plan took into consideration the existing conditions and land use in that area, the trend of development, the matter of preservation of residential values and the best development and general welfare of the entire community. The matter of roads was also considered in connection with the placing

of appellant's property in District "A". There are few main public highways in the area, but many private lanes and streets. Both Litzinger and Warson are old county roads, heavily crowded, comparatively narrow, but adequate for 3 acre minimum area residential development. They are adequate to handle the traffic, but not if the areas were to be divided into small lots. With small lots the density of population would increase and such increased traffic would overburden these main roads. Traffic would increase several times with lot size reduction, because of the services to and the activities of the residents. Litzinger Road was said to be a country lane, with two S curves and sharp turns. Paving is 20 feet, with 18 feet at bridges. There are steep grades on Warson with 20 foot pavement.

The existing residential development in the vicinity of appellant's property is almost entirely of 3 acres or more. Only some five homes within 3000 feet of appellant's property are on less than 3 acre tracts. The improved one family residential properties within 1000 feet of appellant's real estate have a total reasonable market value of $1,290,000. Improved one family residence properties located more than 1000 feet and less than 3000 feet have a reasonable cash value of $1,560,000. A few old houses, originally farm houses, remain in the area but they are not characteristic of the trend of development. Of the total area of 990.27 acres in District "A" approximately one half has been developed with good homes, some built prior to World War II and some subsequent. The development of the area was retarded during the war years, 1942-1945, because of high building costs, priorities and restrictions upon the building of homes of the type common to the district. Some of the vacant property has not been offered for sale or development. About 50% of the acreage assigned to District "B" has also been developed and the rate of absorption of the area in District "A" and District "B" since 1937 has been about the same, indicating a well balanced plan for residential development. The total acreage assigned to the 3 acre minimum area district is none too large for such an area, if it is to retain its character. The development has been moving from east to west and a total of 96 acres in District "A" has been

developed since 1937, though interrupted during the war years. The average land area developed per home built in 1944-1949 was approximately 5 acres. The development has been continuing with nice homes going up. There has been a demand for 3 acre and larger lots. Three acre zoning has apparently produced activity in the area. Building activity has stopped at the border of the "A" district. Property in the 3 acre minimum area district is considered very valuable and difficult to buy. Values in the "A" district were said to assist in supporting values in the districts zoned for smaller minimum areas.

The evidence indicates that appellant's property with a considerable variety in elevations and irregularities of terrain is unusually well suited to the type of development which had already taken place about it on 3 and 5 acre and larger tracts. In such a development a large area is required, since the district cannot maintain its character if sections here and there are developed with smaller lots. Any instrusion of smaller lots into such an area will have the effect of materially impairing the value of the buildings already constructed. A reduction of the minimum area restrictions on appellant's property would have a materially adverse effect on the value of all property in the general vicinity of appellant's land. The zoning ordinance has tended to stabilize and preserve the value of the property in the several districts. The topography of the land, the character of the buildings and many other considerations entered into determining the location of the several districts, and the division lines between the districts, so that one district will not be materially affected by districts of a different classification. Appellant's tract, in view of all factors necessary for consideration is not large enough to provide its own district and, particularly, is not large enough when surrounded by the existing type of development now present about appellant's land. An increase in population in that area from a division into smaller lots and development of appellant's land on such a basis would unbalance the plan for school buildings and improvements, the entire system having been planned as a result of estimated population based on the zoning plan as adopted. Other city services, such as fire and police protection have been planned

and operated in accord with the zoning of appellant's property recommended by city planners, Harland Bertholomew and associates and by the Zoning Commission of the City of Ladue after long study, and as adopted by the city.

The report of the Zoning Commission dated February 18, 1948, pointed out with reference to appellant's property and the extension of District "A" to the western half thereof that said property was "almost entirely surrounded by a 3 acre classification both in Ladue and in the village of Huntleigh"; and that all development in the area now contains three or more acres. Three acre tracts in the vicinity were shown to have sold for $9,000, $12,500 and $15,000 for residence purposes.

Respondent's evidence further tended to show that "appellant's tract was too large to be sold in bulk" for development purposes; that it is too large a tract to be put on the market at once; that on the basis of 100 acres the property should bring approximately $1800 per acre. Other evidence fixed its value, as zoned and for the tract in its entirety, at $1500 per acre. Institutional use would not increase the value of the property, but perhaps its marketability. Appellant has been asking $2500 per acre, an exceedingly high price for a bulk sale of the tract under present zoning. Real estate in 3 acre or larger tracts in the vicinity has consistently sold for $3500 per acre, and some 3 acre lots for $7000 per acre.

The record clearly shows conflicting evidence on issues of fact (1) as to the amount and extent of the damage, if any, to the market value of appellant's property by reason of its classification in the "A" residence district (that is, unless it is only offered for sale as a whole); (2) as to roads and traffic conditions and the results to be anticipated from subdivision and development in smaller tracts upon traffic, city services, fire and police protection and schools; (3) as to the suitability and best use of appellant's land for large or small residence tracts; (4) as to whether appellant's tract is sufficiently large and properly located so as to make a district of its own with much smaller lots and without materially depreciating the value of existing improvements on surrounding properties; and (5) as to existing conditions

and development in the area. Other issues of fact were presented by the oral testimony of numerous witnesses who appeared personally. The trial court saw and heard the witnesses and was in a better position to judge their credibility and the weight and value to be given to their testimony. In finding the issues for respondent and dismissing appellant's petition the court resolved these conflicts against the appellant. Sec. 510.310(2) RSMo 1949. We should and do defer to the trial court's findings on these fact issues.

Appellant contends that "the use and area limitations imposed on plaintiff's 104 acres in District "A" (to not less than 3 acres per family dwelling)" and "the restrictions on the use of plaintiff's land for institutional purposes" are highly unreasonable and "do not bear substantial relation to the public health, safety, morals or general welfare and therefore are invalid as applied to plaintiff." Appellant does "not challenge the constitutional power of cities to enact zoning ordinances, just the validity of the ordinance of the city of Ladue insofar as it affects plaintiff's property." Appellant insists that "a zoning ordinance which requires a minimum of 3 acres (130.680 sq. ft.) per family dwelling is per se arbitrary and unreasonable"; and that the creation of other residential districts with a lesser minimum area per family emphasizes all the more that the restrictive provisions of District "A" bear no relation to the public health, safety, morals or general welfare. Appellant points to the "variations in use and area regulations and side and front yard requirements in A, B, C, D, and E Districts," to the fact that other districts adjoin the "A" district and insists that a family may live safely, healthy and happily on less than one acre. Appellant asks what public necessity requires the ban on the use of land in District "A" to not less than 3 acres per family, while permitting a single family to dwell on much smaller areas in the other districts of the city. Appellant says that its "property, as now limited, is not as marketable"; that the market value has been heavily damaged; that its property is large enough to create its own neighborhood with no appreciable damage to the surrounding properties; and that the purpose of the zoning restrictions of respondent city was "to expand an exclusive

estate district" and "to prevent purchasers of moderate means from acquiring tracts for homesites," since the evidence showed "that acreage in the 'A' District along Warson and Litzinger Roads had sold for from $3,000 to $7,000, per acre in 3 acre tracts.

In this state the matter of "Zoning and Planning" in all incorporated cities, towns and villages, located within counties of ten thousand or more inhabitants, is controlled by legislative enactment, Chapter 89, Secs. 89.010-89.140 RSMo 1949.

In the case of Landau v. Levin, 358 Mo. 77, 213 S.W. (2d) 483, 485, we said: "The city's legislative body has the duty to determine the use classification to be given any particular area. Unless it should appear that the conclusion of the city's legislative body in the respect in issue here is clearly arbitrary and unreasonable, we cannot substitute our opinion for that of the city's Board of Aldermen in zoning the property in question, and establishing the boundary lines. If the city's action in zoning the property is reasonably doubtful or even fairly debatable we cannot do so." And see, City of St. Louis v. Friedman, 358 Mo. 681, 216 S.W. (2d) 475; Schell v. Kansas City, Mo., 360 Mo. 27, 226 S.W. (2d) 718, 719; Women's Kansas City St. Andrew Soc. v. Kansas City, Mo., 58 F. (2d) 593, 598; Zahn v. Board of Public Works, 274 U. S. 325, 71 L. Ed. 1074; Euclid, Ohio v. Ambler Realty Co., 272 U. S. 365, 71 L. Ed. 303.

It is well settled, however, that, "the governmental power to interfere by zoning regulations with the general rights of the landowner by restricting the character of his use, is not unlimited, and, other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare." Nectow v. City of Cambridge, 277 U. S. 183, 188, 72 L. Ed. 842; Washington ex rel. Seattle Title Trust Co., Trustee v. Roberge, 278 U. S. 116, 121, 73 L. Ed. 210.

A zoning ordinance "must rest upon some rational basis of classification and apply alike to all persons and things falling within a designated class." State ex rel. Oliver Cadillac Co. v. Christopher, 317 Mo. 1179, 298 S.W. 720, 726. "In any event the regulation and restriction into districts

must be reasonable, uniform or universal and nondiscriminatory, the restrictions having a fair tendency to accomplish or aid in the accomplishment of some purpose for which the city may exercise its power." City of Richmond Heights v. Richmond Heights M.P.B. Ass'n., 358 Mo. 70, 213 S.W. (2d) 479, 480; Welch v. Swasey, 214 U. S. 91, 105, 53 L. Ed. 923.

"A zoning ordinance may be valid in its general aspects, and yet as to a particular state of facts involving a particular owner affected thereby may be as to such owner so clearly arbitrary and unreasonable as to be unenforceable." Women's Kansas City St. Andrew Soc. v. Kansas City, Mo., supra. Appellant refers to this case as a landmark case containing a fine resume of applicable law of "so many quoteworthy pages that there can be no substitute for complete reading." Other cases relied upon by appellant include American Veterans Housing Cooperative, Inc. v. Zoning Board of Adjustment, 69 D. & C. 449; State ex rel, Synod of Ohio United Lutheran Churches of America v. Joseph et al., 139 Ohio St. 299, 39 N.E. (2d) 515; Lionshead Lake, Inc. v. Wayne Township, 73 A. (2d) 287, 288, 8 N. J. Sup. 468; and Miller v. Seaman et al., 137 Pa. S. 24, 8 A. (2d) 275, 278. In ruling the issue of reasonableness each case must turn upon its own peculiar facts. Landau v. Levin, supra; City of Richmond Heights v. Richmond Heights M.P.B. Ass'n., supra; Taylor v. Schlemmer, 353 Mo. 687, 183 S.W. (2d) 913, 916; Fairmont Inv. Co. v. Woermann, 357 Mo. 625, 210 S.W. (2d) 26, 29; Glencoe Lime & Cement Co. v. City of St. Louis, 341 Mo. 689, 108 S.W. (2d) 143, 145; Welch v. Swasey, supra. "What may be the most appropriate use of any particular property depends not only on all the conditions, physical, economic and social, prevailing within the municipality and its needs, present and reasonably prospective, but also on the nature of the entire region in which the municipality is located and the use to which the land in that region has been or may be put most advantageously." Duffcon Concrete Products v. Borough of Cresskill, 1 N. J. 509, 513, 64 A. (2d) 347, 9 A. L. R. (2d) 678, 681.

The zoning order in question having been enacted by the legislative body of the city pursuant to the police power is

presumed to be valid. Appellant having challenged the constitutionality of the ordinance on the ground of unreasonableness as applied to its property has the burden of proving unreasonableness. State ex inf. Taylor ex rel. Kansas City v. North Kansas City, 360 Mo. 374, 228 S.W. (2d) 762, 774.

The record in this case shows unusual factual conditions. In such situations the respondent city could adopt a comprehensive zoning plan, suitable for its own peculiar location and needs, so long as it acted reasonably and not arbitrarily. "In determining what is reasonable, much must depend upon the requirements of the locality, and what would be reasonable one place might be unreasonable in another." Geneva Ins. Co. v. City of St. Louis, 87 F. (2d) 83, 91. It was for the legislative body of the city to determine for itself what plan, rules and regulations were necessary to promote the public health, safety, morals and general welfare of its inhabitants, and the courts may not interfere unless it has clearly acted unreasonably. City of Richmond Heights v. Richmond Heights M.P.B. Ass'n., supra; State ex rel. Oliver Cadillac Co. v. Christopher, supra; Ryan v. City of Warrensburg, 342 Mo. 761, 117 S.W. (2d) 303.

The fact that loss will be sustained through depreciation, if the ordinance is valid, is not controlling. Every valid exercise of the police power is apt to affect the property of some one adversely. State ex rel. Oliver v. Cadillac Co. v. Christopher, supra; Geneva Ins. Co. v. St. Louis, supra; Ryan v. City of Warrensburg, supra. The fact that neighboring or adjoining property is less restricted than appellant's property does not establish arbitrary zoning or unfair discrimination. City of Richmond Heights v. Richmond Heights M. P. B. Ass'n., supra; Gignoux v. Village of Kings Point, 99 N. Y. S. (2d) 280, 285; Geneva Ins. Co. v. City of St. Louis, supra.

For the purpose of promoting health, safety, morals or the general welfare, respondent was fully authorized to regulate and restrict the size of yards, courts and other open spaces, the percentage of lots that could be occupied, the density of population and the use of the land for residence purposes. Sec. 89.020. For any and all of the pur-

poses mentioned in Sec. 89.020, respondent had the right to divide the municipality into districts of such number, shape and area as it deemed best suited to carry out said purposes. The regulations were required to be uniform for each class, but those in one district could be different from those in another district. Sec. 89.030. The facts as found by the trial court and as we believe them to be, as shown by this record, disclose the adoption of a comprehensive plan designed to lessen congestion in the streets, to secure safety from fire and other dangers, to promote health and the general welfare, to provide adequate light and air, to facilitate adequate provision for transportation and other public requirements. The regulations have been made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the values of existing buildings and for the purpose of encouraging the most appropriate use of the land in the area. Sec. 89.040.

In this case the particular restriction complained of is an integral part of a general plan, which we believe bears a definite and clear relationship to the well established purposes of the police power. The particular provision placing appellant's property in the "A" district, and subjecting it to the 3 acre minimum area restrictions, is supported not alone by this provision's immediate relationship to public health, safety, morals and general welfare, but as a part of the general plan designed to foster the same ends. The evidence shows that the exclusion of appellant's property would clearly interfere with the general zoning plan adopted for the benefit of the entire community. We do not view the ordinance as an attempt to segregate economic classes by zoning or as an attempt to restrict the "A" District or any other districts to particular classes of residents. Appellant conceded that "mansions, ordinary homes and farm houses are all in the same area" in the "A" District.

On the record presented we cannot say that this ordinance, in classifying territory into different residential zones with different minimum area requirements and placing appellant's property in District "A" with minimum 3 acre area restrictions, bears no substantial relation to

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 228

FLORA REALTY AND INVESTMENT COMPANY,
Appellant,

vs.

CITY OF LADUE

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

JOHN H. CUNNINGHAM, JR.,
Counsel for Appellee.

WILLSON, CUNNINGHAM & McCLELLAN,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 228

FLORA REALTY AND INVESTMENT COMPANY,
A CORPORATION,
Appellant,

vs.

CITY OF LADUE, A MUNICIPAL CORPORATION,
Appellee

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

The Appellee in the above entitled cause for its statement in opposition to Appellant's statement as to jurisdiction herein, and in support of Appellee's motion to dismiss or affirm, respectfully shows the following:

I

Statement of Issues on Appeal

The question sought to be presented in this appeal is Appellant's claim that a portion of the Zoning Ordinance of the City of Ladue placing Appellant's tract of 104 acres

of land in the "A" 3-acre minimum area one family residence district wherein institutional use is forbidden except by special permit of the City Council as provided in said Ordinance, is violative of Appellant's rights under the Fourteenth Amendment of the Constitution of the United States. These claims the Appellee denies and the Missouri Supreme Court in the opinion and judgment here challenged determined the questions so raised by Appellant adversely to Appellant. With respect to the institutional use restriction of the Ordinance in question the State Supreme Court found the following:

> "While the use regulations exclude institutions from the "A" residence district, their exclusion is not absolute and location is authorized in the "D" and "E" residence districts and in the "F" (commercial) district, and in the "G" (industrial) district. Further, Section 8 of the Ordinance provides for the filing of a written application for institutional use in districts from which such use is excluded, and for notice, a hearing, a report by the City Planning Commission, and for authority to be granted by the City Council under certain circumstances. In case the City Planning Commission or the owners of 10% or more of the property within 1,000 feet of the premises object, the favorable vote of ¾ths of all members of the City Council is required to authorize the use. And see, Section 89.060 (Mo. Statutes 1949 Edition). In effect each application is ruled with reference to public health, safety, morals or general welfare after a hearing and report by the City Planning Commission. * * * In addition, the use of a specific part or all of Appellant's property for any specific institutional use or purpose is not presented by this record. The issue is not brought 'to exact focus.' The pleadings and evidence fail to show that any such application has been filed or denied, or that there is any specific use in prospect, or that any specific institutional use is contemplated. Appellant can not challenge the validity

of Section 8 of the Ordinance on hypothetical grounds. The question necessarily must be involved in the case before the Court. Rust v. Mo. Dental Board, 348 Mo. 616, 155 S. W. (2d) 80, 85. In the circumstances shown by this record no ground for equitable relief on this issue is presented, and we may not rule as to the validity of Section 8 supra."

It is apparent from the foregoing that the State Supreme Court disposed of Appellant's attack on the institutional use restrictions of the Ordinance upon adequate non-Federal grounds, and accordingly jurisdiction here can not be predicated on that portion of the State Court's ruling. (*Fox Film Corp.* v. *Muller*, 296 U. S. 207, 80 Law Ed. 158, 56 S. Ct. 183.)

II

No Substantial Federal Question Is Presented by the Attempted Appeal

The only remaining contention attempted to be presented is that a provision of the City Ordinance placing Appellant's property in a district wherein the use of property is limited to single family residences on tracts of not less than three acres, constitutes the taking of Appellant's property without due process of law for the sole reason that "the zoning law arbitrarily discriminated against the plaintiff in the use of its land, to its financial disadvantage while permitting others in different districts in close proximity to it to have broader market and development opportunities for land not any better suited environmentally or inherently for broader uses than plaintiff's land" (Tr. pp. 10-11). It is apparent that this does not present a substantial Federal question under such pleadings (see *Memphis Natural Gas Co.* v. *Beeler*, 315 U. S. 649, 86 Law Ed. 1090, 62 S. Ct. 857) and under the particular facts involved in this case. No authority is cited in Appellant's jurisdictional statement

herein in support of its contentions. The power of States and Cities to place restraints and restrictions on the use of property by zoning laws in furtherance of the general welfare of the community has long ago been so definitely determined that no substantial question is presented by this appeal entitling appellant to invoke the jurisdiction of the Supreme Court of the United States. See *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 71 Law Ed. 303, 47 S. Ct. 114; *Zahn* v. *Board of Public Works*, 274 U. S. 325, 71 Law Ed. 1074, 47 S. Ct. 594, and *Hadacheck* v. *Sebastian, et al.*, 239 U. S. 394, 60 Law Ed. 348, 36 S. Ct. 143.

The opinion of the State Supreme Court is replete with findings of fact substantiating the due process afforded appellant as well as the lack of any substantial Federal question. As stated by this Court in *Portland Ry., etc., Co.* v. *Oregon R. R. Commission*, 229 U. S. 397, 51 Law Ed. 1248, 33 S. Ct. 820:

> "In this case the facts found by the lower court and adopted in the (State) Supreme Court are supported by competent testimony; and this Court does not sit to retry issues of fact thus heard and determined by the properly constituted tribunals of the State having jurisdiction of the subject."

The Missouri Supreme Court found the following facts in its opinion in 246 S. W. (2d):

> "1. c. 773. The Ordinance in question #282 of the City of Ladue embraced all land in the City limits, it being that of a comprehensive zoning plan."
>
> "1. c. 773. Three acre minimum zoning has been known to the area including Appellant's property since the year 1934, and the City of Ladue adopted a zoning ordinance including a minimum three acre area in the year 1938."
>
> 1. c. 776. The Zoning Ordinance in question has tended to stabilize and preserve the value of the prop-

erty in the several districts and a reduction of the minimum area restrictions on Appellant's property would have a materially adverse effect on the value of all property in the general vicinity of Appellant's land."

"1. c. 776. Appellee, City of Ladue, planned its city services, such as fire and police protection, in accordance with the zoning plan in question."

"1. c. 779. Exclusion of Appellant's property would clearly interfere with the general zoning plan adopted for the benefit of the entire community."

Other controlling facts appear in the opinion of the State Supreme Court.

Appellee does not know how many hundreds of thousands of cities, towns and villages there are in the United States; but it is a matter of such common knowledge that this Court will judicially know that virtually all of them have enacted zoning ordinances. When we consider the possibility of this Court having to sit to retry or reconsider the facts involved in attacks on various sections of that many municipal ordinances we can better understand the reason for the rule in *Portland, etc.* v. *Oregon, etc., supra,* that gives finality to fact findings made by the State Supreme Court in cases of this kind. With these fact findings accepted and binding, and with the applicable rules of law for testing the validity and constitutionality of zoning laws having been heretofore established and charted by this Court as follows: (1) that where there is any reasonable basis for the zoning restriction the Courts will not substitute their judgment for that of the legislative body (*Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 71 Law Ed. 303, 47 S. Ct. 114); and (2) the mere fact that zoning restriction results in some diminution in value or loss of money is not sufficient to render a zoning law unconstitutional (*Zahn* v. *Board of Public Works*, 274 U. S. 325, 71 Law Ed. 1074, 47 S. Ct. 594), it is clear that no substantial question is presented which entitles Appellant

to invoke the jurisdiction of this Court, particularly when it is apparent that the reasonableness of the restrictive provision in question, as applied to Appellant's property, must turn upon multiple factual matters which have all been resolved adversely to Appellant by both the trial court and the State Supreme Court. Perhaps nothing illustrates the reasonableness of minimum area restrictions in zoning laws more pointedly than the fact that every reported case which we have been able to find dealing with minimum area restrictions sustains the validity of the restriction. (See *Dillard* v. *Village of North Hills*, 94 N. Y. S. (2d) 715; *Simon* v. *Needham*, 311 Mass. 560, 42 N. E. (2d) 516; *Gignoux, et al.* v. *Village of Kings Point*, 99 N. Y. S. (2d) 280 and *Elbert* v. *Village of North Hills*, 28 N. Y. S. (2d) 317.

WHEREFORE, Appellee respectfully moves that the appeal herein be dismissed or that the judgment and decree of the Supreme Court of the State of Missouri be affirmed.

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IN THE

Supreme Court of the United States

No.

FLORA REALTY AND INVESTMENT COMPANY, a corporation,
Appellant,

v.

CITY OF LADUE, a municipal corporation, *Appellee*

Appeal from the Supreme Court of Missouri.

BRIEF OF APPELLANT IN OPPOSITION TO STATEMENT OF APPELLEE RE JURISDICTION AND IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM.

JURISDICTION.

The jurisdiction of this Court is invoked by virtue of Section 1257 (2) of Title 28 U.S.C.; 62 Stat. 929.

OPINION BELOW.

The Opinion of the Supreme Court of Missouri is to be found in the Jurisdictional Statement filed in this matter as Exhibit D, and in 246 S.W. (2d) 771.

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED.

Statutes involved are Section 1257 (2) of Title 28 U.S.C.; 62 Stat. 929 and City Ordinance #282 of the City of Ladue, a city of the fourth class of the State of Missouri, which Ordinance is contained in the Jurisdictional Statement filed in this matter as Exhibit A. Section 1 of Article XIV of the Constitution of the United States is the constitutional provision invoked herein.

PRELIMINARY STATEMENT.

Appellant since 1911 has been the owner of 104 acres of undeveloped land in St. Louis County, Missouri now located in the City of Ladue, a municipality which contains some 5158 acres and only 5386 persons (1950 census). It lies a few miles west of the western boundaries of the City of St. Louis.

The Zoning Ordinance here involved was adopted by the City of Ladue in July of 1948. It divides the city into seven districts. District "A", in which there are approximately 1000 acres, is the most highly restricted of all—requiring a minimum lot of three acres (130,680 square feet) per family and forbidding institutional use except on special permit. Appellant's land was placed by said Ordinance and District Map (an integral part thereof) in District "A". Said District Map is to be found in Exhibit "A", attached to the Jurisdictional Statement. The location of Appellant's land is outlined thereon in red.

There is no symmetry in the layout of District "A" which is adjacent to two golf clubs and embraces a third, and it has a common "frontier" adjacent to Appellant's land with the Village of Huntleigh.[1]

---

[1] Only two places in the entire State of Missouri require under zoning ordinances a minimum of three acres per family in certain districts. They are the City of Ladue and the Village of Huntleigh. The Village of Huntleigh at one time had an ordinance calling for a minimum of 4.9 acres per family and forbade insti-

Appellant filed a Bill in Equity against the City of Ladue in the Circuit Court of St. Louis County, Missouri on the 24th day of November 1948, challenging the validity of its zoning law under the State and Federal constitutions, insofar as it classified and restricted the use of Appellant's 104 acres of land for residential purposes, in tracts of less than three acres per family, and forbade institutional use. (Tr. 5-11, R..)[2] (Appendix herewith)

The Trial Court after a hearing dismissed the Petition and rendered judgment in favor of Defendant. The matter was appealed to the Supreme Court of the State of Missouri and this Appeal has been lodged from its decision adverse to Appellant.

ARGUMENT.

I. Appellee Has Excised Meaningful Words and Has Blended Paragraphs in Its Quotation from the Opinion.

Under the caption, "*Statement of Issues on Appeal*", the Appellee purports to quote from the Opinion of the Missouri Supreme Court. However, the excerpt is incomplete in material respects and gives a distorted version of what the Court had to say with reference to the institutional use and restriction.

The part quoted by the Appellee is set up as if the opening words were the beginning of a paragraph, without any indication of omissions of the topic sentence. The opening sentence omitted from the paragraph reads:

"There remains only the question of whether the re-

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tutional use but the first ordinance was held unconstitutional in *Sulgrave Realty Company* v. *Village of Huntleigh*, No. 9401, (1937), in the District Court of the United States for the Eastern Judicial District of Missouri. (unreported)

[2] The Transcript of evidence has not as yet been filed by the Supreme Court of Missouri and hence the Record has not been officially printed under the direction of the Clerk of this Court.

strictions on institutional use in the A District was 'highly unreasonable'."[3]

When the omitted words are read in relationship to the balance of the quoted part, it is obvious that the Missouri Supreme Court was ruling on that issue, which necessarily involved a Federal, no less than a State constitutional question, under the briefs submitted to the Court.

The excerpt relied on by Appellee is in reality made up of two paragraphs. A significant part of the second paragraph, which is masked by asterisks in the excerpt, was omitted by Appellee. We submit that the first and second sentences of the paragraph that were left out by Appellee demonstrate that the Court ruled adversely to the contention that the Ordinance was in contravention of the XIV Amendment.[4]

On the basis of its emasculated presentation of the Opinion the Appellee then argues that the State Supreme Court disposed of Appellant's attack on the institutional use restrictions of the Ordinance upon adequate non-Federal grounds. The Opinion refutes the Appellee.

II. Appellee Has Distorted the Issues Below and Overlooked Controlling Factors.

Under the heading of *"No Substantial Federal Question is Presented by the Attempted Appeal,"* the Appellee stated,

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[3] *Flora Realty & Investment Co.* v. *City of Ladue*, 246 S.W. (2d) 771, 779.

[4] The omitted parts read as follows:

> "Viewing the ordinance as a part of a general zoning plan and in its general scope, there is no doubt as to its validity. Euclid, Ohio v. Ambler Realty Co. supra, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 311. Our statutes, Chapter 89, Sec. 89.010 et seq. expressly provide for the regulation of land use. the divisions into districts, et cetera. Further, the police power, as evidenced by the zoning ordinance, is not limited to the mere suppression of offensive uses of property, but may act constructively for the promotion of the general welfare." lc. 780.

"The only remaining contention attempted to be presented is that a provision of the City Ordinance placing Appellant's property in a District wherein the use of property is limited to single family residences on tracts of not less than three acres constitutes the taking of Appellant's property without due process of law for the sole reason that 'the zoning law arbitrarily discriminated against the Plaintiff in the use of its land, to its financial disadvantage while permitting others in different districts in close proximity to it to have broader market and development opportunities for land not any better suited environmentally or inherently for broader uses than plaintiff's land'."

The limited and inaccurate excerpt from Appellant's Petition quoted by Appellee distorts the full range of Appellant's pleading. An examination of the Petition, which is set out in full in Appendix, will show that the Federal issues before the Trial Court were not as narrowly drawn as Appellee implies. However, even if the issues before the Trial Court had not drawn in question the validity of the Ordinance on *all* of the Federal grounds urged before the Missouri Supreme Court and ruled on by it, the Appellee has stressed an immaterial matter. This Court in passing on its jurisdiction under Section 1257 (2) 28 U.S.C., looks to the state supreme court's opinion and not to the trial court to determine if the validity of a statute was drawn into question on federal grounds, and if the decision was in favor of its validity. *Home Insurance Co.* v. *Dick,* 281 U.S. 397, 407, 74 L.Ed. 926, 933; *Chicago, R.I. & P.R. Co.* v. *Perry,* 259 U.S. 547, 551, 66 L.Ed. 1056, 1058.

III. The Decision Below Involved Determinations of Federal Constitutional Questions.

The Court in its Opinion (*Flora Realty and Investment Co.* v. *City of Ladue,* 246 S.W. (2d) 771) held,

1. That the restrictions in the Ordinance on the use of Appellant's property for institutional purposes were not

unreasonable in as much as the restriction on institutional use was not absolute in other Districts, and it also cited Section 8 of the Ordinance, permitting use exceptions under certain circumstances for institutional use. (lc. 779, 780)

2. That it could not rule on the validity of said Section 8 as the pleadings and evidence did not show Appellant had applied for or been denied a permit thereunder. In addition, "the use of a specific part or all of Appellant's property for a specific institutional use or purpose is not presented by this Record." (lc. 780.)

3. That "Viewing the Ordinance as a part of the general zoning plan and in its general scope, there is no doubt as to its validity." (lc. 780.)

4. That "We do not view the Ordinance as an attempt to segregate economic classes by zoning or as an attempt to restrict the "A" District, or any other districts to particular classes of residents." (lc. 779.)

5. That "On the Record presented we cannot say that this Ordinance, in classifying territory into different residential zones with different minimum area requirements and placing Appellant's property in District "A" with minimum three acre area restrictions, bear no substantial relation to public health, safety, morals or general welfare and therefore, is unreasonable under the facts shown. We must hold that the issue is fairly debatable and, in respect to the classification of Appellant's property, the Ordinance in that respect is valid." (lc. 779.)

IV. It Is Not Necessary for the Court Below to Expressly Say It Is Ruling on a Federal Question.

The citation by Appellee of *Memphis Natural Gas Co.* v. *Beeler*, 315 U.S. 649, 86 L. Ed. 1090, 62 S. Ct. 857, and *Fox Film Corporation* v. *Muller*, 296 U.S. 207, 80 L. Ed. 158, leaves us puzzled. The decision of the Missouri

Supreme Court turned on constitutional issues and not on local or non-Federal grounds. It is not necessary for the Court below to specifically designate that it is ruling on a Federal constitutional question. See *New York ex rel Bryant* v. *Zimmerman,* 278 U.S. 63, 66; also Exhibit B of Jurisdictional Statement.

V. Every Zoning Case Involving the Validity of Classifications as Applied to a Particular Property and Situation Is Sui Generis.

The references to *Euclid* v. *Ambler Realty Co.,* 272 U. S. 365, *Zahn* v. *Board of Public Works,* 274 U. S. 325, and *Hadacheck* v. *Sebastian,* 239 U. S. 394, by Appellee, as if the constitutional questions raised herein have already been determined, are highly misleading. Appellant is not seeking to have elementary matters redetermined, but based upon the particular facts and circumstances in this case poses substantial questions. It has been heavily damaged by the restrictive legislation, and it is not in court for frivolous purposes.

As this Court well knows, every opinion handed down by it is to be read having regard to the facts of the case and the question actually decided. In zoning cases the rule is no different. In the Euclid case (supra) this Court emphasized that ". . . the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality." (lc. 388.)

In *Nectow* v. *Cambridge,* 277 U. S. 183, 72 L. Ed. 842, this Court struck down a provision in a city zoning ordinance which unreasonably classified particular property, and made it clear that the governmental power to interfere by zoning with the general rights of the land owner is not unlimited, and other questions aside, such restriction cannot

be imposed if it does not bear a substantial relation to the public health, safety, morals or general welfare.

"The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." This quotation from Mr Justice Holmes' opinion in *Pennsylvania Coal Co.* v. *Mahon, et al,* 260 U. S. 293, emphasizes that every case under the police power must rest on its own bottom.

Appellee has premised one of its arguments upon a confessed ignorance of how many cities, towns and villages there are in the United States (intimating an exaggerated figure despite available census data), to set up a bugaboo that this Court will be overwhelmed with zoning cases if it reviews the constitutional issues in this matter. The same logic would require this Court to deny redress to any of the 150 million citizens of the United States because there are so many of them, some of whom may some day require judicial intervention against infringement of Federal constitutional rights.

The right to have particular zoning legislation examined in the light of its classification of a particular property has been expressly recognized in *Euclid* v. *Ambler, (supra,* le. 395). Appellee would have such rights and those accorded under Section 1257, Title 28, U. S. C. denied to Appellant not on the basis of the merits, but by a not very subtle suggestion to this Court to deny due process and to abandon its function.

VI. When This Court Reviews State Court Judgments Involving Constitutional Issues It Must Review Both the Legal Issues and Factual Matters With Which They Are Commingled.

We believe that the excessive and unconstitutional restrictions complained of by Appellant are manifest on the face of the Ordinance in this case, but if the Court can't resolve the questions of law without resort to other facts and circumstances in the Record, it is not bound in a case

of this kind by the findings of the Court below on questions of law or on a composite of fact and law.

This is not an appeal involving findings in an anti-trust suit, or from a judgment in a Federal Court on general issues turning on findings of fact, or an appeal stemming from an administrative proceeding wherein special expertise has passed on questions of fact as in *Portland Ry. etc. Co.* v. *Oregon R. R. Commission*, 229 U. S. 397, 51 L. Ed. 1248. The excerpt in said case as quoted by Appellee from page 412 of the Opinion is not the complete paragraph but only the latter part of one. The omitted sentences which precede make a distinction between that type of case and of others where the Court will re-examine the facts found, with a view to ascertaining the correctness of the conclusions reached. Two of the leading cases therein are again cited by this Court in *United States* v. *John J. Felin & Co.*, 334 U. S. 624, 639, 640, 92 L. Ed. 1614, 1626. The rule on the scope of review was restated there as follows:

> "* * * Where the conclusion is a 'composite of fact and law,' Cedar Rapids Gas Light Co. v. Cedar Rapids, 223 U. S. 655, 668, 56 L. Ed. 594, 604, 32 S. Ct. 389, this Court may certainly hold that as a matter of law the findings are erroneous. See e.g., Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 528, 56 L. Ed. 863, 869, 32 S. Ct. 535. Even when this Court reviews State court judgments involving constitutional issues it 'must review independently both the legal issues and those factual matters with which they are commingled.' See Oyama v. California, 332 U. S. 633, 636, ante, 249, 254, 68 S. Ct. 269 (and the authorities therein cited.) Similarly, findings concurred in by two courts do not control the decision here where 'facts and their constitutional significance are too closely connected' and 'the standards and the ultimate conclusion involve questions of law inseparable from the particular facts to which they are applied.' United States v. Appalachian Electric Power Co. 311 U. S. 377, 403, 85 L. Ed. 243, 250, 61 S. Ct. 291. * * *".

Also see *Smith* v. *Allwright*, 321 U. S. 649, 662, 88 L. Ed. 987, 996; *Great Northern R. Co.* v. *Washington*, 300 U. S.

154, 165, 166, 81 L. Ed. 573, 581; *Fay* v. *New York*, 332 U. S. 261, 272, 91 L. Ed. 2043, 2052; *Truax* v. *Corrigan*, 257 U. S. 312, 324, 325; 66 L. ed. 254, 259, 260.

VII. Simon v. Needham Cited by Appellee Points Up the Merits of Appellant's Complaint in This Appeal.

Appellee has cited four cases dealing with minimum area restrictions, but none of them involved a restriction on land use for residential purposes of three acres per family. Three of the cases are by New York intermediate appellate courts.

Simon v. *Needham*, 311 Mass. 560, 42 N. E. 2d 516, is a leading case. The court there upheld a one-acre minimum requirement for residences in connection with a village zoning ordinance.[8] The court, fearful that its ruling would be misconstrued, stated:

> "We cannot quite pronounce the instant by-laws invalid when applied to petitioner here in all the circumstances disclosed by this record. We make no intimation that if the lots were required to be larger than an acre, or if the circumstances would be slightly different, the same result would be reached."

The Court further stated:

> "A zoning by-law cannot be adopted for the purpose of setting up a barrier against the influx of thrifty and respectable citizens who desire to live there and who are able to and willing to erect homes upon lots upon which fair and reasonable restrictions have been imposed, nor for the purpose of protecting the large estates that are already located in the district. The strictly local interest of the town must yield, if it appears that it is plainly in conflict with the general interest in the public at large . . ."

In *Gignoux et al.* v. *Village of King's Point*, 99 N. Y. S. 2nd 280, relied on by Appellee, the trial court was dealing

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[8] There is a considerable spread between 1 acre and 3 acre zoning—to be exact, 87,120 sq. ft.

with zoning of less than one acre,—40,000 square feet. It sustained the restriction on the basis of *Simon* v. *Needham, supra*, as well as that of *Dillard* v. *Village of North Hills*, 94 N. Y. S. 2d 715, but it felt impelled to state that it was "a most unusual Village surrounded by water on three sides, heavily wooded, with no business," and the Court requoted from *Simon* v. *Needham* that a zoning law cannot be used as a barrier against the influx of thrifty and respectable citizens, etc.

In *Dillard* v. *Village of North Hills, supra*, the court was dealing with a zoning ordinance providing for a two acre residence district. The judgment of the lower court which held that the zoning ordinance was unconstitutional and void and as an attempt to protect the large estates in the village, was reversed in a short opinion, and the court held that the two acre restriction was justifiable "as an elastic application of police power". Apparently the court's "elastic" was stretched by certain facts it stressed with reference to the plaintiffs there:

> "*They purchased for the purpose of resale with profit with knowledge of the restriction* . . . They sold four of 48 acres for more than half the purchase price, and the remainder of their parcel on their own showing is worth as much or more than the sum paid for the entire parcel. The parcel is of the same quality as the average land in the village" (94 N. Y. S. 2d 715).

The plaintiffs took an appeal, but later dismissed it.

In *Elbert* v. *Village of North Hills*, 28 N. Y. S. 2nd 317, the decision turned on a question of pleading only in a suit pertaining to two acre zoning restrictions of the same village of North Hills, (involved in the *Dillard* case, *supra*). Most of that opinion consists of obiter.

We observe that the case of *Sulgrave Realty Co.* v. *Village of Huntleigh*, to which we referred in footnote 1 of this brief, has not been mentioned by the Appellee, although it is quite familiar with that decision pertaining to a contiguous village in St. Louis County that had attempted by zoning to preserve and extend an exclusive estate district with

a minimum lot area of 4.9 acres per family. The late Judge C. B. Faris held that the ordinance was enacted "solely for the purpose of prohibiting the development and improvement of the remaining undeveloped tracts of land in said Village, except in the form of large estates . . .", and that the ordinance violated the constitution of the United States, and constituted a taking of property without just compensation, and was not a constitutional or reasonable exercise of the police power of the State of Missouri.

VIII. The Missouri Supreme Court Has Decided Federal Questions of Substance Not Heretofore Determined by This Court and in A Way Not in Accord With Applicable Decisions of This Court.

The matters on appeal are covered by the Assignment of Errors annexed to the Jurisdictional Statement. They raise important questions not only from the viewpoint of Appellant but to property owners everywhere and of various incorporated communities.

The questions in this case are of constitutional importance. *Can* a city consistently with the XIV Amendment, by zoning, restrict the use of land suitable for residential purposes to tracts of not less than three acres per family? *Can* a city consistently with the XIV Amendment, by zoning, restrict the use of land suitable for churches, schools, hospitals, orphanages and homes for the aged, without a permit for such purposes, which permit is dependent in a measure on the caprice and reaction of certain neighbors, which in turn determines how many votes of the City Council must be cast for such permit? Cf. *Washington ex rel Seattle Title Trust Co.* v. *Roberge*, 278 U. S. 116, 122, 123, 73 L. Ed. 210, 214 and *Eubank* v. *City of Richmond*, 226 U. S. 137, 143, 144. *Can* a City consistently with the XIV Amendment, by zoning, so classify and restrict the use of property suitable for either residential or institutional purposes, in a manner designed to prevent its use by people of moderate means or humanitarian institutions? See *Womens*

Kansas City St. Andrews Society v. *Kansas City*, 58 F. (2nd) 593, 601, 604. An answer to these virgin questions is involved in this Appeal.

IX. Courts of Some States Have Not Hesitated to Tear the Sham Away from Zoning Laws Designed to Segregate Economic Classes.

See *American Veterans Housing Corp. Inc.*, v. *Zoning Board of Adjustment*, 69 D. & C. 449 (1949 Pa.). Also *Lionshead Lake, Inc.* v. *Wayne Township*, 73 A. 2d 287, 288, 8 N. J. Sup. 468, (1950); *Elizabeth Lake Estates et al.* v. *Waterford Tp.* 317 Mich. 359, 26 N. W. 2d 788, (1947).

In *Trust Company of Chicago* v. *City of Chicago*, 408 Ill. 91, 96 N. E. 2d 499, 505, 506, the court had up for review an ordinance of the City of Chicago which had rezoned certain lots in a block, occupied by fine mansions, to prevent the construction of apartments. The City contended it had a valid right to "preserve the block as an oasis of gracious family living in a locality of unique natural beauty" lc. 502. The Court concluded that the ordinance was not passed to promote general welfare, but was seeking to bestow upon individual residents special benefits so they may continue in their "oasis of gracious family living."

X. IN CONCLUSION.

We sincerely believe that the Ordinance here under assail was not based upon necessities of public health, safety, morals or general welfare, but upon a desire to employ the device of zoning to make exclusive districts more exclusive.

In *Minnesota* v. *Barber*, 136 U. S. 313, 319, this Court stated that the presumption that the statute (on meat inspection) was enacted in good faith for the purpose expressed in the title, cannot control the final determination of the question of whether it *is* repugnant to the constitution of the United States. The court held that there may be no purpose on the part of a legislature to violate the constitution, and yet a statute enacted by it, may by its necessary

operation, be destructive of constitutional rights. It quoted from *Henderson etc.* v. *New York etc.* 92 U. S. 259, 268, "In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect." Other cases were cited to like effect. "The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments."

The natural effect of the ordinance here assailed has been to destroy the opportunities of people in moderate circumstances to buy homes sites in District "A". (See Item 8 of Exhibit C, a part of Jurisdictional Statement). It has also deprived the community of desirable locations for humanitarian institutions, churches, schools and the like.

The decision of the Missouri Supreme Court, if allowed to stand, establishes a precedent that through the instrumentality of zoning regulations exclusive estate districts can be fostered and encouraged. Greater restrictions on land use without compensation can be justified under the same rationale. Despite the needs of a growing population, families in moderate circumstances and philanthropic institutions and schools will find the best sites barred against use by them, because reserved by "law" for the benefit of a select few.

This Appeal is properly lodged and should be heard on its merits.

Respectfully submitted,

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Washington, D. C.

July 15, 1952.

APPENDIX.

IN THE
CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI

Div. No. 2
Cause No. 185310

FLORA REALTY AND INVESTMENT COMPANY, a corporation,
Plaintiff,

v.

CITY OF LADUE, a municipal corporation, *Defendant*

Bill in Equity to Decree a Portion of City Ordinance #282 (Zoning Ordinance) of the City of Ladue to be Void and Unconstitutional.

Amended Petition.

Now comes the plaintiff in the above-captioned matter and for its cause of action states as follows:

1. That it is now and was at all times hereinafter mentioned a Missouri corporation and the owner, for more than 35 years, of 103.618 acres of land in St. Louis County, Missouri, now a part of the City of Ladue, having a frontage of 1676.04 feet on the east side of Lindbergh Boulevard and extending eastwardly to the west side of Warson Road, said property being a short distance south of Litzinger Road; that approximately 100 acres of said tract are unimproved and are used for agricultural purposes.

2. That the City of Ladue is now and was at all times hereinafter mentioned a municipal corporation (city of fourth class) organized and existing under the laws of the State of Missouri; that the said municipality adopted a

zoning ordinance #282 on the 19th day of July, 1948; that in said zoning ordinance, the land embraced in its city limits is divided into seven districts; that a "District Map" dated the 17th day of May, 1948, was made a part of the ordinance, and it provides (Section 2) that all the notations, references and other information shown on the "District Map" shall be as much a part of the ordinance "as if the matters and information set forth by said map were all fully described therein."

3. The aforesaid ordinance is attached to and made a part hereof. It places the property of plaintiff in District A subject to use and area limitations of Section 9. Property *for residential purposes* in District A is the most highly restricted of all the districts, namely to a minimum of *three acres per family*. The restrictions in District B call for a minimum of *1.8 acres per family;* District C for a minimum of 30,000 square feet (*approximately ¾ of an acre*) per family; in District D for a minimum of *15,000 square feet per family;* in District E for a minimum of *10,000 square feet per family* (approximately one-thirteenth of the minimum space required in District A). The restrictions in District F permit a family to dwell on the second floor of any commercial structure on a lot fronting 25 feet or more, even though the lot contains *less than 10,000 square feet.*

4. (This paragraph was stricken by order of Court on motion of defendant, May 23, 1949.)

5. Plaintiff avers that the health, safety and welfare of the City of Ladue do not require a limitation on the use of plaintiff's property to a minimum of three acre tracts per family for residential purposes; that it believes and therefore avers that the zoning law with reference to plaintiff's property was adopted pursuant to a plan to maintain and expand in the city of Ladue a most exclusive "estate" district available for residences to only the opulent.

6. Plaintiff states that the matters complained of have affected the marketability and value of its property which is now subject to the terms of arbitrary, discriminatory, and unreasonable restrictions on its use; that the zoning and classification of its property in District A constitutes the taking and damaging of its property without compensation and without due process of law; that the City of Ladue has acted in violation of the following provisions of the Constitution of the State of Missouri, and of the Fourteenth Amendment to the Constitution of the United States for the foregoing reasons and those hereinafter set out.

a) In violation of Article 1, Section 10 of the Constitution of the State of Missouri, which forbids the deprivation of liberty or property without due process of law. The restrictions aforesaid on use and area are without relationship to the needs of the health, safety, morals and general welfare of the citizenry (present and future) of Ladue. Plaintiff avers that the City of Ladue in passing the ordinance in the manner and form aforesaid partially confiscated private property of plaintiff for arbitrary or esthetic purposes and created a section in which citizens in moderate circumstances could not afford to dwell, thereby establishing a special residential area for entrenched wealth to the prejudice of plaintiff's rights and of others.

b) In violation of Article 1, Section 26 of the Constitution of the State of Missouri which prohibits the taking or damaging of private property for public use without just compensation and which provides for a jury of at least three freeholders to fix damages in such connection. Plaintiff avers that its property has been damaged and that part of its value has been taken in the arbitrary and unreasonable limitation on the use thereof, without compliance with said provision of the Constitution, if the restriction on use is for "public" purposes. Plaintiff avers that the restriction on use of its property in less than three acre parcels for single residential purposes, or for multiple dwellings or

school purposes, or religious institutions is unreasonable; that the building lines and height restrictions are arbitrary.

c) In violation of Article 1, Section 28 of the Constitution of Missouri, which provides that private property shall not be taken for private use, with or without compensation, unless by consent of the owner, except for very limited purposes. It further provides that when an attempt is made to take private property for a use alleged to be public, the question of whether the contemplated use is actually public shall be judicially determined without regard to the legislative declarations thereon. Plaintiff states that its property has been "taken" for non-public use under the mask of a zoning regulation.

d) In violation of the Fourteenth Amendment to the Constitution of the United States which forbids through state action (the City of Ladue is an instrumentality of the State of Missouri) the deprivation of liberty or property without due process of law or the denial to any person within its jurisdiction of the equal protection of law. (See paragraph 6 (a) hereof.). Plaintiff states that the arbitrary and unreasonable classification of its property in District A was a denial to it of equal protection of law, in that the zoning law arbitrarily discriminated against plaintiff in the use of its land, to its financial disadvantage, while permitting others in different districts (see paragraphs 3 and 5 hereof) in close proximity to it to have broader market and development opportunities for land not any better suited environmentally or inherently for broader uses than plaintiff's land.

7. Plaintiff further states that it has no adequate remedy at law to protect the title of its property which is now subject to the burden of an unreasonable limitation on its use that although it has requested the City of Ladue to refrain from such interferences with its property or damaging its value that it has been to no avail; that it has suffered and

will suffer incalculable and irreparable injury and damage if a court of equity does not intervene and grant relief.

Wherefore, plaintiff prays for a judgment, order and decree that ordinance # 282 of the City of Ladue, insofar as it restricts the use of plaintiff's property, is unreasonable, arbitrary and discriminatory and that the restrictions affecting plaintiff's property in District A are void and unconstitutional, and that the said ordinance has taken and damaged plaintiff's property without due process of law, and for such further orders and decrees as to the court may seem meet and proper.

ANNALEA WELKER,
VICTOR PACKMAN,
Attorneys for Plaintiff

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No. 228. FLORA REALTY & INVESTMENT CO. *v.* CITY OF LADUE. Appeal from the Supreme Court of Missouri. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Victor Packman* and *Morris Miller* for appellant. *John H. Cunningham, Jr.* for appellee. Reported below: 362 Mo. 1025, 246 S. W. 2d 771.